

**THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO:

2014/04699

In the matter between:

**MOBILE TELEPHONE NETWORKS (PTY) LTD**

Applicant

and

**THE CHAIRPERSON OF THE INDEPENDENT  
COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

1st Respondent

**THE INDEPENDENT COMMUNICATIONS AUTHORITY  
OF SOUTH AFRICA**

2nd respondent

**VODACOM (PTY) LTD**

3rd Respondent

**CELL C (PTY) LTD**

4th Respondent

**TELKOM SA LTD**

5th Respondent

**NEOTEL (PTY) LTD**

6th Respondent

**45 DEGREES CONSULTING (PTY) LTD**

7<sup>st</sup> Respondent

**ALTECH TECHNOLOGY CONCEPTS (PTY) LTD**

8<sup>th</sup> Respondent

**ROSE COURTZ TRADING (PTY) LTD t/a BITCO**

9<sup>th</sup> Respondent

**COMMUNICATIONS GLOBAL NETWORK SERVICES  
LTD t/a BT GLOBAL SERVICES**

10<sup>th</sup> Respondent

|   |                             |
|---|-----------------------------|
| <b>BUSINESS CONNEXION (PTY) LTD</b>                               | 11 <sup>th</sup> Respondent |
| <b>CMC GLOBAL CONSULTING (PTY) LTD</b>                            | 12 <sup>th</sup> Respondent |
| <b>COMPATEL AFRICA (PTY) LTD</b>                                  | 13 <sup>th</sup> Respondent |
| <b>FROGFOOT NETWORKS (PTY) LTD</b>                                | 14 <sup>th</sup> Respondent |
| <b>CONNECT FIRST TELECOMS (PTY) LTD t/a FNB CONNECT</b>           | 15 <sup>th</sup> Respondent |
| <b>GATEWAY COMMUNICATIONS (PTY) LTD</b>                           | 16 <sup>th</sup> Respondent |
| <b>HYMAX TALKING SOLUTIONS (PTY) LTD</b>                          | 17 <sup>th</sup> Respondent |
| <b>WIRELESS BUSINESS SOLUTIONS (PTY) LTD t/a iBURST</b>           | 18 <sup>th</sup> Respondent |
| <b>INTERCEL ONLINE AFRICA (PTY) LTD</b>                           | 19 <sup>th</sup> Respondent |
| <b>DIMENSIONS DATA (PTY) LTD</b>                                  | 20 <sup>th</sup> Respondent |
| <b>LIQUID TELECOMMUNICATIONS OPERATIONS SA (PTY) LTD</b>          | 21 <sup>st</sup> Respondent |
| <b>MIA TELECOMMUNICATIONS (PTY) LTD</b>                           | 22 <sup>nd</sup> Respondent |
| <b>MUTLISOURCE TELECOM (PTY) LTD</b>                              | 23 <sup>rd</sup> Respondent |
| <b>MWEB CONNECT (PTY) LTD</b>                                     | 24 <sup>th</sup> Respondent |
| <b>ECN TELECOMMUNICATIONS (PTY) LTD t/a NASHUA COMMUNICATIONS</b> | 25 <sup>th</sup> Respondent |
| <b>OHREN TELECOM (PTY) LTD t/a O-TEL</b>                          | 26 <sup>th</sup> Respondent |

|   |                             |
|---|-----------------------------|
| <b>SAICOM TECHNOLOGY (PTY) LTD</b>      | 27 <sup>th</sup> Respondent |
| <b>SKYCALL NETWORKS (PTY) LTD</b>       | 28 <sup>th</sup> Respondent |
| <b>SWITCH TELECOM (PTY) LTD</b>         | 29 <sup>th</sup> Respondent |
| <b>TELFREE COMMUNICATIONS (PTY) LTD</b> | 30 <sup>st</sup> Respondent |
| <b>VOX TELECOM (PTY) LTD</b>            | 31 <sup>st</sup> Respondent |

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### **NOTICE OF MOTION**

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#### **PART A**

**TAKE NOTICE** that the above-mentioned applicant intends to make application to this Court on 25 February 2014 at 10h00 or so soon thereafter as counsel may be heard, for an order in the following terms:

- 1 Enrolling Part A as an urgent application, dispensing with the forms and service provided for in the Rules of Court and directing that the matter be heard as an urgent application in terms of Rule 6(12) of the Uniform Rules of Court;
- 2 Pending the final determination of Part B (including any appeals that may be brought in relation to Part B), the following provisions of the Call Termination Regulations, 2014 as published in Government Notice 65 of 2014 ("the 2014 Call Termination Regulations") are suspended with immediate effect:

- 2.1 Regulations 3(a), 4, 5, 6, 7(1), 7(2), 7(3)(a), 7(4)(a)(i), 7(4)(b), 8 and 9 of the 2014 Call Termination Regulations; and
  - 2.2 Paragraphs 1 and 2 of Appendix A to the 2014 Call Termination Regulations;
- 3 *In the alternative to paragraph 2 above:* directing that, with effect from 1 March 2014 until the final determination of Part B including any appeals that may be brought in relation thereto ("the interim period"), the payment of mobile termination fees to the applicant, the third respondent, the fourth respondent and the fifth respondent and the payment of mobile termination fees by the applicant and the third to 31<sup>st</sup> respondents is to occur as follows:
  - 3.1
    - 3.1.1 for the duration of the interim period, the applicant, the third respondent, the fourth respondent and the fifth respondent shall continue to charge the wholesale call charge termination rates to a mobile location as specified in the Call Termination Regulations published in Government Notice 1015 of 2010 in the amounts that applied immediately prior to the commencement of the 2014 Call Termination Regulations on 1 March 2014;
    - 3.1.2 in the event that the relief sought in Part B is finally dismissed, the applicant, the third respondent, the fourth respondent and the fifth respondent shall forthwith pay to every other party to



this application other than the first and second respondents the difference (if any) between the mobile termination fees paid to them during the interim period as provided for in paragraph 3.1.1 above and the mobile termination fees that would have been payable to them during the interim period had such fees been calculated in accordance with the 2014 Regulations;

3.2 That paragraph 3.1 above is to operate as an interim order with immediate effect pending the final determination of Part B below (including any appeals that may be brought in relation to Part B);

- 4 Granting the applicant further and/or alternative relief;
- 5 Ordering the second respondent to pay the applicant's costs on a joint and several basis along with any other respondent who opposes Part A; *alternatively* directing that the costs of the application for the relief sought in Part A be reserved for determination in the application for the relief sought in Part B.

**TAKE NOTICE FURTHER** that the accompanying affidavit of Zunaid Bulbulia and the annexures thereto will be used in support hereof.

**TAKE NOTICE FURTHER** that the applicant has appointed the offices of **Webber Wentzel Attorneys** (below) as the address at which it will accept service of all process and proceedings.

**TAKE NOTICE FURTHER** that if any of the respondents intend to oppose the relief sought in Part A, such respondents are required:

(a) to notify the applicant's attorney in writing on or before 16h00 on Friday, 14 February 2014 and in such notice to appoint an address within 8 kilometres of the office of the Registrar of this Honourable Court at which the respondents will accept notice and service of all process in these proceedings; and

(b) to file their answering affidavits on or before 16h00 on Tuesday, 18 February 2014.

**TAKE NOTICE FURTHER** that the applicant will file its replying affidavit on or before Thursday, 20 February 2014.

**KINDLY ENROLL THE MATTER IN PART A FOR HEARING ACCORDINGLY.**

**PART B**

**TAKE NOTICE** that the above-mentioned applicants intend to make application to this Court in terms of Uniform Rule of Court 53 on a date to be determined by the Registrar for an order in the following terms:

- 1 Reviewing and setting aside the following provisions of the Call Termination Regulations, 2014 as published in Government Notice 65 of 2014 ("the 2014 Call Termination Regulations"):

- 1.1 Regulations 3(a), 4, 5, 6, 7(1), 7(2), 7(3)(a), 7(4)(a)(i), 7(4)(b), 8 and 9 of the 2014 Call Termination Regulations; and

- 1.2 Paragraphs 1 and 2 of Appendix A to the 2014 Call Termination Regulations;

- 2 *In the alternative to paragraph 1 above:* reviewing and setting aside the second respondent's decision to make the following provisions of the 2014 Call Termination Regulations:

- 2.1 Regulations 3(a), 4, 5, 6, 7(1), 7(2), 7(3)(a), 7(4)(a)(i), 7(4)(b), 8 and 9 of the 2014 Call Termination Regulations; and

- 2.2 Paragraphs 1 and 2 of Appendix A to the 2014 Call Termination Regulations;

- 3 Granting the applicant further or alternative relief;

- 4 Ordering the second respondent to pay the applicant's costs on a joint and several basis along with any other respondent who opposes this application;

**TAKE NOTICE FURTHER** that the accompanying affidavit of Zunaid Bulbulia and the annexures thereto will be used in support hereof.

**TAKE NOTICE FURTHER** that the first and second respondents are hereby called upon, in terms of Uniform Rule of Court 53(1)(a), to show cause why the abovementioned decisions should not be reviewed and set aside.

**TAKE NOTICE FURTHER** that in terms of Uniform Rule of Court 53(1)(b), the first and second respondents are hereby called upon to dispatch, within fifteen (15) days of receipt of this notice of motion, to the Registrar, the record of all documents and all electronic records (including any correspondence, contracts, memoranda, advices, recommendations, evaluations and the like) that relate to the making of the decision that is sought to be reviewed and set aside, together with such reasons as the respondents are by law required or may require to give or make, and to notify the applicants' attorneys that they have done so.

**TAKE NOTICE FURTHER** that within 10 days of receipt of the record from the Registrar, the applicants may, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of its notice of motion and supplement their founding affidavit in terms of Uniform Rule of Court 53(4).

**TAKE NOTICE FURTHER** that the applicant has appointed the offices of **Webber Wentzel attorneys** (below) as the address at which it will accept service of all process and proceedings.

**TAKE NOTICE FURTHER** that if any of the respondents intend to oppose the relief sought in Part B, such respondents are required:

- (a) within 15 days of this notice of motion or any amendment thereto as contemplated in Uniform Rule of Court 53(4) to deliver a notice to the applicants' attorneys that such respondents intend to oppose and in such notice to appoint an address within 8 kilometres of the office of the Registrar of this Honourable Court at which the respondents will accept notice and service of all process in these proceedings;
- (b) within 30 days of the expiry of the time referred to in Uniform Rule of Court 53(4), to deliver any affidavits as the respondents may desire in answer to the allegations made by the applicants.

DATED at Johannesburg on this 12th day of February 2014.

~~WEBBER~~ WENTZEL

Applicant's Attorneys

10 Fricker Road, Illovo Boulevard

Johannesburg, 2196

PO Box 61771, Marshalltown

Johannesburg, 2107, South Africa

Ref: Stuart McCafferty/2420953

Tel: 011 530 5300

Fax: 011 530 6300

TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT

AND TO:

**1<sup>st</sup> Respondent**

**THE CHAIRPERSON OF THE INDEPENDENT  
COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

Block A, B, C and D,  
Pinmill Farm, 164 Katherine Street,  
Sandton

**2<sup>nd</sup> Respondent**

**THE INDEPENDENT COMMUNICATIONS AUTHORITY  
OF SOUTH AFRICA**

Block A, B, C and D,  
Pinmill Farm, 164 Katherine Street,  
Sandton

**3<sup>rd</sup> Respondent**

**VODACOM (PTY) LTD**

Vodacom Corporate Park,  
82 Vodacom Boulevard, Vodacom Valley,  
Midrand,  
Johannesburg

**4<sup>th</sup> Respondent****CELL C (PTY) LTD**

150 Rivonia Road,  
Sandown,  
Sandton

**5<sup>th</sup> Respondent****TELKOM SA LTD**

152 Proes Street,  
Pretoria

**6<sup>th</sup> Respondent****NEOTEL (PTY) LTD**

44 Old Pretoria Main Road,  
Midrand,  
Johannesburg

**7<sup>th</sup> Respondent****45 Degrees Consulting (Pty) Limited**

14th Floor Marble Towers  
208-212 Jeppe Street  
Johannesburg

**8<sup>th</sup> Respondent****Altech Technology Concepts (Pty) Limited**

2 Augrabies Road  
Waterfall Office Park  
Bekker Road  
Midrand 1685

**9<sup>th</sup> Respondent****Rose Courtz Trading cc t/a BitCo**

Paragon House  
Olivedale Office Park  
Lima Street  
Olivedale, 2158

**10<sup>th</sup> Respondent****Communications Global Network Services Limited t/a BT Global Services**

BT Building  
Woodmead North Office Park  
54 Maxwell Drive  
Woodmead, 2191

**11<sup>th</sup> Respondent****Business Connexion (Pty) Limited**

789 16th Road  
Randjiespark  
Midrand, 1685

**12<sup>th</sup> Respondent****CMC Global Consulting (Pty) Limited**

4b Naivasha Road

Sunninghill Park

Johannesburg, 2146

**13<sup>th</sup> Respondent****Compatel Africa (Pty) Limited**

Block G Hurlingham Office Park

Woodlands Avenue

Sandton, 2196

**14<sup>th</sup> Respondent****Frogfoot Networks (Pty) Limited**

Frogfoot HQ, Suite 20-102D

Building 20, Waverly Business Park

Koetzee Road

Mowbray

Cape Town, 7700

Per-Email:

**15<sup>th</sup> Respondent****Connect First Telecoms (Pty) Limited t/a FNB Connect**

1 First Place

Bank City, Corner Jeppe and Simmonds

Johannesburg

**16<sup>th</sup> Respondent****Gateway Communications (Pty) Limited**

Harrowdene Office Park

Western Service Rd

Bryanston, 2191

**17<sup>th</sup> Respondent****Hymax Talking Solutions (Pty) Limited**

Block B, Aintree Park

1 Loch Close

Kenilworth, 7700

**18<sup>th</sup> Respondent****Wireless Business Solutions (Pty) Limited t/a iBurst**

3012A William Nicol Drive

Bryanston, 2021

**19<sup>th</sup> Respondent****Intercel Online Africa (Pty) Limited**



1 Donkin Place  
Wendywood, 2144

**20<sup>th</sup> Respondent**

**Dimension Data (Pty) Limited trading through Internet Solutions (Pty) Limited**  
Le Mans Building  
Dimension Data Campus  
57 Sloane Street  
Bryanston

**21<sup>st</sup> Respondent**

**Liquid Telecommunications Operations SA (Pty) Limited**  
150 Bryanston Drive  
Bryanston, 2196

**22<sup>nd</sup> Respondent**

**MIA Telecommunications (Pty) Limited**  
134 Walton Road  
Carlswald  
Midrand

**23<sup>rd</sup> Respondent**

**Multisource Telecoms (Pty) Limited**  
Block B, Second Floor  
Cnr Alexandra Avenue & 2nd Street  
Midrand, 1682

**24<sup>th</sup> Respondent**

**MWEB Connect (Pty) Limited**  
MWEB building  
100 Fairway Close  
Parow

**25<sup>th</sup> Respondent**

**ECN Telecommunications (Pty) Limited t/a Nashua Communications (Pty) Limited**  
Unit 10 Growthpoint Business Park  
No 2 Tonnetti Street  
Midrand, 1685

**26<sup>th</sup> Respondent**

**Ohren Telecom (Pty) Limited t/a O-Tel**  
9 Wiek Street  
Boksburg, 1462

**27<sup>th</sup> Respondent**

**Saicom Technology (Pty) Limited**  
2<sup>nd</sup> Floor, West Wing  
158 Jan Smuts Avenue  
Rosebank, 2196

**28<sup>th</sup> Respondent**  
**Skycall Networks (Pty) Limited**  
Skycom House  
Silver Lakes Office Park II  
Von Backstrom Boulevard  
Silver Lakes  
Pretoria, 0054  
Per-Email:

**29<sup>th</sup> Respondent**  
**Switch Telecom (Pty) Limited**  
Second Floor, Building 11A  
The Woodlands Office Park  
Woodlands Drive, Woodmead

**30<sup>th</sup> Respondent**  
**Telfree Communications (Pty) Limited**  
254 Carina Street  
Waterkloof  
Pretoria

**31<sup>st</sup> Respondent**  
**Vox Telecom (pty) Limited**  
Block B, Rutherford Estate  
1 Scott Street  
Waverly

**THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO: \_\_\_\_\_

In the matter between:

**MOBILE TELEPHONE NETWORKS (PTY) LTD**

Applicant

and

**THE CHAIRPERSON OF THE INDEPENDENT  
COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

1<sup>st</sup> Respondent

**THE INDEPENDENT COMMUNICATIONS AUTHORITY  
OF SOUTH AFRICA**

2<sup>nd</sup> respondent

**VODACOM (PTY) LTD**

3<sup>rd</sup> Respondent

**CELL C (PTY) LTD**

4<sup>th</sup> Respondent

**TELKOM SA SOC LTD**

5<sup>th</sup> Respondent

**NEOTEL (PTY) LTD**

6<sup>th</sup> Respondent

**45 DEGREES CONSULTING (PTY) LTD**

7<sup>th</sup> Respondent

**ALTECH TECHNOLOGY CONCEPTS (PTY) LTD**

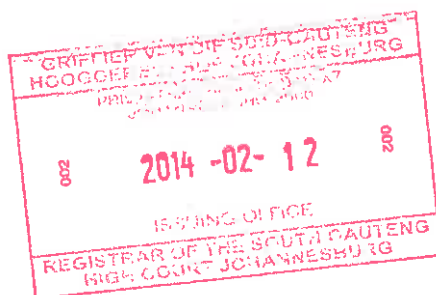
8<sup>th</sup> Respondent

**ROSE COURTZ TRADING (PTY) LTD t/a BITCO**

9<sup>th</sup> Respondent

**COMMUNICATIONS GLOBAL NETWORK SERVICES  
LTD t/a BT GLOBAL SERVICES**

10<sup>th</sup> Respondent



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|   |                             |
|---|-----------------------------|
| <b>BUSINESS CONNEXION (PTY) LTD</b>                                   | 11 <sup>th</sup> Respondent |
| <b>CMC GLOBAL CONSULTING (PTY) LTD</b>                                | 12 <sup>th</sup> Respondent |
| <b>COMPATEL AFRICA (PTY) LTD</b>                                      | 13 <sup>th</sup> Respondent |
| <b>FROGFOOT NETWORKS (PTY) LTD</b>                                    | 14 <sup>th</sup> Respondent |
| <b>CONNECT FIRST TELECOMS (PTY) LTD t/a FNB CONNECT</b>               | 15 <sup>th</sup> Respondent |
| <b>GATEWAY COMMUNICATIONS (PTY) LTD</b>                               | 16 <sup>th</sup> Respondent |
| <b>HYMAX TALKING SOLUTIONS (PTY) LTD</b>                              | 17 <sup>th</sup> Respondent |
| <b>WIRELESS BUSINESS SOLUTIONS (PTY) LTD t/a iBURST</b>               | 18 <sup>th</sup> Respondent |
| <b>INTERCEL ONLINE AFRICA (PTY) LTD</b>                               | 19 <sup>th</sup> Respondent |
| <b>DIMENSIONS DATA (PTY) LTD</b>                                      | 20 <sup>th</sup> Respondent |
| <b>LIQUID TELECOMMUNICATIONS OPERATIONS SA<br/>(PTY) LTD</b>          | 21 <sup>st</sup> Respondent |
| <b>MIA TELECOMMUNICATIONS (PTY) LTD</b>                               | 22 <sup>nd</sup> Respondent |
| <b>MUTLISOURCE TELECOM (PTY) LTD</b>                                  | 23 <sup>rd</sup> Respondent |
| <b>MWEB CONNECT (PTY) LTD</b>   | 24 <sup>th</sup> Respondent |
| <b>ECN TELECOMMUNICATIONS (PTY) LTD t/a NASHUA<br/>COMMUNICATIONS</b> | 25 <sup>th</sup> Respondent |
| <b>OHREN TELECOM (PTY) LTD t/a O-TEL</b>                              | 26 <sup>th</sup> Respondent |

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**SAICOM TECHNOLOGY (PTY) LTD**

27<sup>th</sup> Respondent

**SKYCALL NETWORKS (PTY) LTD**

28<sup>th</sup> Respondent

**SWITCH TELECOM (PTY) LTD**

29<sup>th</sup> Respondent

**TELFREE COMMUNICATIONS (PTY) LTD**

30<sup>st</sup> Respondent

**VOX TELECOM (PTY) LTD**

31<sup>st</sup> Respondent

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**FOUNDING AFFIDAVIT**

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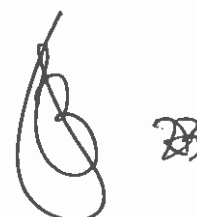
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**INTRODUCTION**

I the undersigned


Zunaid Bulbulia

do hereby make oath and say as follows:

- 1 I am the Chief Executive Officer of the applicant.
- 2 I am duly authorised by the applicant to bring this application and to depose to this founding affidavit on its behalf.
- 3 The facts that I depose to are true and correct and are, save where otherwise indicated, within my personal knowledge. Where I make legal submissions, I rely on advice that the applicant has received from its legal representatives.

**THE PARTIES**

- 4 The applicant is MOBILE TELEPHONE NETWORKS (PTY) LTD ("MTN"), a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at 216, 14<sup>th</sup> Avenue, Fairland, Roodepoort.
- 5 The 1<sup>st</sup> respondent is the CHAIRPERSON OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA, who is cited herein by virtue of the provisions of Uniform Rule of Court 53(1). The first respondent's principal place of business is Block A, B, C and D, Pinmill Farm, 164 Katherine Street, Sandton.






- 6 The 2<sup>nd</sup> respondent is the INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ("ICASA"). ICASA is a juristic person, established as such in terms of section 3 of the Independent Communications Authority of South Africa Act 13 of 2000. The second respondent's principal place of business is Block A, B, C and D, Pinmill Farm, 164 Katherine Street, Sandton.
- 7 The 3<sup>rd</sup> respondent is VODACOM (PTY) LTD ("Vodacom"), a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at Vodacom Corporate Park, 82 Vodacom Boulevard, Vodacom Valley, Midrand, Johannesburg.
- 8 The 4<sup>th</sup> respondent is CELL C (PTY) LTD ("Cell C"), a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at 150 Rivonia Road, Sandown, Sandton.
- 9 The 5<sup>th</sup> respondent is TELKOM SA SOC LTD ("Telkom"), a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at 152 Proes Street, Pretoria.
- 10 The 6<sup>th</sup> respondent is NEOTEL (PTY) LTD, a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at 44 Old Pretoria Main Road, Midrand, Johannesburg.
- 11 The remaining respondents are as follows:

- 11.1 The 7<sup>th</sup> respondent is 45 DEGREES CONSULTING (PTY) LTD a company duly incorporated in terms of the company laws of the



Republic of South Africa and having its principal place of business at 14th Floor Marble Towers 208-212 Jeppe Street Johannesburg.

- 11.2 The 8<sup>th</sup> respondent is ALTECH TECHNOLOGY CONCEPTS (PTY) a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at 2 Augrabies Road, Waterfall Office Park ,Bekker Road, Midrand.
- 11.3 The 9<sup>th</sup> respondent is ROSE COURTZ TRADING (PTY) LTD t/a BITCO a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at Paragon House, Olivedale Office Park, Lima Street,,Olivedale
- 11.4 The 10<sup>th</sup> respondent is COMMUNICATIONS GLOBAL NETWORK SERVICES LTD t/a BT GLOBAL SERVICES a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at BT Building, Woodmead North Office Park, 54 Maxwell Drive Woodmead.
- 11.5 The 11<sup>th</sup> respondent is BUSINESS CONNEXION (PTY) LTD a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at 789 16th Road Randjiespark Midrand.
- 11.6 The 12<sup>th</sup> respondent is CMC GLOBAL CONSULTING (PTY) LTD a company duly incorporated in terms of the company laws of the



Republic of South Africa and having its principal place of business at 4b Naivasha Road Sunninghill Park Johannesburg.

- 11.7 The 13<sup>th</sup> respondent is COMPATEL AFRICA (PTY) LTD a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at Block G Hurlingham Office Park, Woodlands Avenue, Sandton.
- 11.8 The 14<sup>th</sup> respondent is FROGFOOT NETWORKS (PTY) LTD a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at Frogfoot HQ, Suite 20-102D, Building 20, Waverly Business Park, Koetzee Road, Mowbray.
- 11.9 The 15<sup>th</sup> respondent is CONNECT FIRST TELECOMS (PTY) LTD t/a FNB CONNECT a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at 1 First Place, Bank City, Corner Jeppe and Simmonds ,Johannesburg.
- 11.10 The 16<sup>th</sup> respondent is GATEWAY COMMUNICATIONS (PTY) LTD a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at Harrowdene Office Park, Western Service Rd, Bryanston.
- 11.11 The 17<sup>th</sup> respondent HYMAX TALKING SOLUTIONS (PTY) LTD a company duly incorporated in terms of the company laws of the

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Republic of South Africa and having its principal place of business at Block B, Aintree Park, 1 Loch Close, Kenilworth.

11.12 The 18<sup>th</sup> respondent is WIRELESS BUSINESS SOLUTIONS (PTY) LTD t/a iBURST a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at 3012A William Nicol Drive, Bryanston.

11.13 The 19<sup>th</sup> respondent is INTERCEL ONLINE AFRICA (PTY) LTD a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at 1 Donkin Place, Wendywood

11.14 The 20<sup>th</sup> respondent is DIMENSIONS DATA (PTY) LTD a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at Le Mans Building, Dimension Data Campus, 57 Sloane Street, Bryanston.

11.15 The 21<sup>st</sup> respondent is LIQUID TELECOMMUNICATIONS OPERATIONS SA (Pty) Ltd a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at 150 Bryanston Drive, Bryanston.

11.16 The 22<sup>nd</sup> respondent is MIA TELECOMMUNICATIONS (PTY) LTD a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at 134 Walton Road, Carlswald, Midrand.

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- 11.17 The 23<sup>rd</sup> respondent is MUTLISOURCE TELECOM (PTY) LTD a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at Block B, Second Floor, Cnr Alexandra Avenue & 2nd Street, Midrand.
- 11.18 The 24<sup>th</sup> respondent is MWEB CONNECT (PTY) LTD a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at MWEB building, 100 Fairway Close, Parow.
- 11.19 The 25<sup>th</sup> respondent is ECN TELECOMMUNICATIONS (PTY) LTD t/a NASHUA Communications a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at Unit 10 Growthpoint Business Park, No 2 Tonnetti Street, Midrand.
- 11.20 The 26<sup>th</sup> respondent is OHREN TELECOM (PTY) LTD t/a O-TEL a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at 9 Wiek Street, Boksburg.
- 11.21 The 27<sup>th</sup> respondent is SAICOM TECHNOLOGY (PTY) LTD a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at 2<sup>nd</sup> Floor, West Wing, 158 Jan Smuts Avenue, Rosebank.

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- 11.22 The 28<sup>th</sup> respondent is SKYCALL NETWORKS (PTY) LTD a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at Skycom House, Silver Lakes Office Park II, Von Backstrom Boulevard, Silver Lakes, Pretoria.
- 11.23 The 29<sup>th</sup> respondent is SWITCH TELECOM (PTY) LTD a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at Second Floor, Building 11A, The Woodlands Office Park, Woodlands Drive, Woodmead.
- 11.24 The 30<sup>th</sup> respondent is TELFREE COMMUNICATIONS (PTY) LTD a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at 254 Carina Street, Waterkloof, Pretoria.
- 11.25 The 31<sup>st</sup> respondent is VOX TELECOM (PTY) LTD a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at Block B, Rutherford Estate, 1 Scott Street, Waverly.
- 12 The 6<sup>th</sup> to 31<sup>st</sup> respondents are cited by virtue of any interest they may have in this application by virtue of the fact that they pay fees to the mobile operators for terminating calls on the mobile operators' networks, as more fully described below.

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## THE PURPOSE OF THIS APPLICATION

13 On 4 February 2014, ICASA published the Call Termination Regulations, 2014 in Government Notice 65 of 2014 ("the 2014 Regulations"). With effect from 1 March 2014, the 2014 Regulations will determine the fees that MTN may charge for terminating calls on the MTN network, and the fees that other mobile operators may charge MTN for terminating calls on their networks.

14 MTN contends that the 2014 Regulations are unlawful and irregular.

15 This application seeks relief in two parts:

15.1 In Part B, MTN seeks an order reviewing and setting aside the provisions of the 2014 Regulations that directly affect MTN. The review application is brought in terms of the normal time periods in Rule 53 of the Uniform Rules of Court.

15.2 In Part A, MTN seeks interim relief in the form of an order suspending the relevant provisions of the 2014 Regulations pending the final determination of the review in Part B. In the alternative, MTN seeks interim relief in the form of an order directing each party to pay and receive mobile termination fees according to the regulated rates that currently apply, pending the final determination of Part B.

16 My affidavit will be structured as follows:

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- 16.1 I begin by dealing with the factual background.
- 16.2 I then describe the legal background.
- 16.3 Thereafter I describe the events that preceded the promulgation of the 2014 Regulations.
- 16.4 I then set out the grounds on which MTN contends that the 2014 Regulations are unlawful.
- 16.5 Finally, I explain the basis on which MTN seeks interim relief.

## **MOBILE TERMINATION FEES**

- 17 MTN is a mobile network operator. It offers mobile telecommunications services (colloquially known as "cell-phone services") to its customers in South Africa. MTN is licensed to do so in terms of the Electronic Communications Act 36 of 2005 ("the ECA").
- 18 Vodacom, Cell C and Telkom are the other entities that provide mobile telecommunications services in South Africa. They are licensed to do so in terms of the ECA.
- 19 Telkom provides mobile telecommunications services through a division known as Telkom Mobile. Telkom Mobile is not a juristic person; it is merely an operating division of Telkom. Where it is necessary to distinguish the mobile business of Telkom from the fixed-line business, I shall refer to "Telkom Mobile".

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20 In order for the customers of different telecommunication networks to be able to communicate with each other, each network must be connected to all other networks. This is known in the industry as "interconnection". Interconnection means that the MTN network is connected to the Telkom Mobile network, the Telkom fixed-line network, the Cell C network, the Vodacom network and the Neotel network (and vice versa).

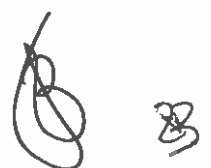
21 A mobile network operator pays a fee to the mobile network operator on which a call is terminated. These are known as "call termination fees" and are charged per minute (or for any fraction thereof). I can illustrate this by a simple example using MTN and Cell C for purposes of illustration:

21.1 Assume that a Cell C subscriber dials the number of an MTN subscriber. The call originates on Cell C's network and is at some point switched to the MTN network in order to reach the cellular number for which it is destined (and on which it will be terminated).

21.2 It follows that the call will be conveyed on *both* the Cell C network *and* the MTN network.

21.3 The caller is billed for the call by Cell C since the caller is a Cell C customer. It is not possible for MTN to bill this caller for the use of the MTN network for the simple reason that the caller is not an MTN customer.

21.4 In order to compensate MTN for the termination of the call on its network, the interconnection agreement between Cell C and MTN

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requires Cell C to pay MTN a mobile termination fee. The fee is paid *by Cell C to MTN* in consideration for the conveyance of the call on the MTN's network.

21.5 The same principle applies in reverse if an MTN customer dials a Cell C network. In this case, it is MTN that pays the mobile termination fee to Cell C.

22 In short, mobile termination fees are the fees paid by mobile network operators to each other in order to compensate the payee for the use of its network in terminating a call that originates on the network of the payer. In practice, the payer recovers the mobile termination fee when it bills its customer for making the call.

## THE LEGAL BACKGROUND

23 The subject matter of this application has to do with ICASA's regulation of mobile termination fees. The regulation takes the following form.

### ***Section 67 of the ECA***

24 Section 67(4) of the ECA provides that ICASA must prescribe regulations defining the relevant markets so that pro-competitive conditions may be imposed upon licensees having significant market power in circumstances where ICASA determines that such markets have ineffective competition.

25 Sections 67(4)(a) to (f) contain a list of what these regulations must provide for.

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- 26 Section 67(4)(c) is of particular relevance for present purposes. It provides that the regulations must "set out the pro-competitive measures ICASA may impose in order to remedy the perceived market failure in the markets or market segments found to have ineffective competition taking into account subsection (7)".
- 27 Section 67(7), in turn, contains a list of "pro-competitive terms and conditions". The list includes "price controls" in relation to matters connected with "interconnection" (section 67(7)(h)(i)).
- 28 Section 67(8) envisages a review of the pro-competitive conditions imposed by ICASA. When ICASA conducts such a review, it is obliged to "decide whether to modify the pro-competitive conditions set by reference to a market determination" (section 67(8)(a)(ii)). Where ICASA decides that a licensee continues to possess significant market power "but due to changes in the competitive nature of such market or market segment the pro-competitive conditions are no longer proportional in accordance with subsection (7), ICASA must modify the applicable pro-competitive conditions applied to that licensee to ensure proportionality" (section 67(8)(c)).

***The position before 1 March 2011***

- 29 Before 1 March 2011, mobile termination fees were not regulated by ICASA. Each mobile operator concluded agreements with the other mobile operators providing for the interconnection of their networks and the payment of mobile termination fees.

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- 30 The peak and off-peak mobile termination fees payable to MTN by, Vodacom and Cell C (in Cell C's case, after November 2001) and payable to MTN by Telkom (in Telkom's case, after March 2010) are summarised below. These mobile termination fees were symmetrical between mobile operators – in other words, these were also the rates payable by MTN to Vodacom and Cell C (in Cell C's case, after November 2001) and Telkom (in Telkom's case, after March 2010):

| <b>Date fee agreed as per contract</b> | <b>Mobile termination fees: peak</b> | <b>Mobile termination fees: off-peak</b> | <b>MTN's contracting party</b> |
|--|--------------------------------------|--|--------------------------------|
| August 1994                            | R0,20                                | R0.10                                    | Vodacom                        |
| July 1999                              | R0,50                                | R0.30                                    | Vodacom                        |
| July 2000                              | R0,80                                | R0.45                                    | Vodacom                        |
| July 2001                              | R1,19                                | R0.65                                    | Vodacom                        |
| November 2001                          | R1,23                                | R0.73                                    | Vodacom / Cell C               |
| January 2005                           | R1,25                                | R0.77                                    | Vodacom / Cell C               |
| March 2010 to 1 March 2011             | R0,89                                | R0.77                                    | Vodacom / Cell C / Telkom      |

***The position from 1 March 2011 to 1 March 2014***

- 31 On 29 October 2010, ICASA published the Call Termination Regulations in Government Notice 1015 of 2010. I shall refer to these as "the 2010 Regulations". A copy of the 2010 Regulations is annexed marked "ZB 1", together with the explanatory note that accompanied the 2010 Regulations.
- 32 Regulation 3 defined two markets. The one that is of most relevance for present purposes is "Market 1", which was defined as the market for the wholesale voice call termination services to a mobile location on the network of a mobile network operator. "Market 2" was defined as the market for the

wholesale voice call termination services to a fixed location. In simple terms, Market 1 involved the termination of calls on a mobile network and Market 2 involved the termination of calls on a fixed-line network.

33 In Regulations 4 and 5, ICASA determined that competition in the wholesale voice call termination markets was ineffective.

34 In Regulation 6, ICASA determined that each licensee that offers wholesale voice call termination services has significant market power in its own market. This determination applied to MTN, Vodacom, Cell C and Telkom Mobile (after Telkom Mobile entered the market in October 2010).

35 In Regulation 7, ICASA found various market failures in the wholesale voice call termination markets. Regulation 7(2) proceeded to impose pro-competitive terms and conditions on all licensees in Market 1 so as to overcome these market failures. One of these terms involved the obligation to "charge fair and reasonable prices for wholesale voice call termination consistent with Appendix B" (regulation 7(2)(c)).

36 Regulation 7(3) determined that "additional pro-competitive terms and conditions" were necessary in relation to MTN and Vodacom in Market 1. In other words, these "additional pro-competitive terms and conditions" did not apply to Cell C or Telkom Mobile. The "additional pro-competitive terms and conditions" imposed on MTN and Vodacom were listed in regulation 7(5). For present purposes, Regulation 7(5)(b) is of particular importance. It provided that, for the period 1 March 2011 to 1 March 2014, MTN and Vodacom would

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be obliged to charge the wholesale voice call termination rates specified in Table 1. Table 1 provided as follows:

|              | Peak calls | Off-peak calls |
|--------------|------------|----------------|
| 1 March 2011 | R0.73      | R0.65          |
| 1 March 2012 | R0.56      | R0.52          |
| 1 March 2013 | R0.40      | R0.40          |

37 The Table contained what was described in the Explanatory Note as a "glide-path". The point of the aviation metaphor is that the Table provided for a descent in relation to mobile termination rates charged by MTN and Vodacom. The glide-path commenced with a steep reduction in call termination rates with effect from 1 March 2011, and was followed by further reductions in the subsequent two years.

38 I have indicated above that the glide-path in Table 1 did not apply to Cell C or Telkom Mobile. Their call termination rates were regulated by Appendix B:

38.1 Paragraph 1.2 of Appendix B provided that, in general, licensees must charge "reciprocal rates with the rate set for MTN and Vodacom" in Market 1. Although the phrase "reciprocal rates" was not defined, I assume that it means that a licensee must charge the same rate to terminate a call on its network, as it is charged by MTN and Vodacom to terminate calls on their network. In effect, these would be the rates in Table 1.



38.2 However, paragraph 1.3 of Appendix B provided that mobile operators other than MTN and Vodacom. (i.e. Cell C and Telkom Mobile) could charge higher mobile termination fees than those specified in Table 1 if they satisfied "either or both" of the requirements in that paragraph. Since the rate was higher than the rate in Table 1, it was referred to as an "asymmetric rate". The asymmetry existed because the rate that Cell C (for example) could charge MTN to terminate calls on the Cell C network, would not be the same as the rate that MTN could charge Cell C to terminate calls on the MTN network.

38.3 Paragraph 2 imposed a limit on the asymmetrical rate that Cell C and Telkom Mobile were entitled to charge. It provided that a licensee "who qualifies for an asymmetric rate" may charge the following maximum percentages above the rates in Table 1:

- From 1 March 2011: 20%
- From 1 March 2012: 15%
- From 1 March 2013: 10%.

39 With effect from 1 March 2011, MTN has adhered to the glide-path in the 2010 Regulations. This meant that the mobile termination rates charged by MTN decreased (in the case of peak calls) by 18% on 1 March 2011, by 23% with effect from 1 March 2012, and by 29% with effect from 1 March 2013. These reductions had negative financial implications for MTN:

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39.1 The Table below describes the contribution of interconnection to the MTN business (the "interconnection margin"). This contribution is made of two components: the revenues generated by MTN from interconnection fees ("interconnection revenues"), minus the payment of interconnection fees by MTN to other operators ("interconnection costs").

39.2 The impact of the 2010 Regulations can be seen in terms of the substantial reduction in interconnection margin between 2010 (i.e. prior to their implementation on 1 March 2011) and mid-2013. The interconnection margin reduced by 1.2 billion Rand over the period.

|                               | <b>FY 2010</b>       | <b>FY 2011</b>       | <b>FY 2012</b>     | <b>HY to June 2013</b> |
|-------------------------------|----------------------|----------------------|--------------------|------------------------|
| Interconnection revenues      | 6,567,980,950        | 5,924,140,880        | 4,925,639,100      | 1,910,960,300          |
| Interconnection costs         | 5,086,936,990        | 4,741,872,320        | 4,156,141,920      | 1,648,988,650          |
| <b>Interconnection margin</b> | <b>1,481,043,960</b> | <b>1,182,268,560</b> | <b>769,497,180</b> | <b>261,971,650</b>     |

39.3 The reduction in interconnection margin has had a negative impact on MTN's business. The 2010 Regulations created a substantial decline in interconnection margin (as indicated in the table above). The reason that this did not translate into a large reported EBITDA decline was that new, unrelated (data) revenues grew substantially during the period, masking the voice decline, and MTN successfully managed to cut costs during the glide-path period.



40 From the perspective of Cell C and Telkom Mobile, the impact of the 2010 Regulations was overwhelmingly positive:

40.1 The immediate impact of the 2010 Regulations was to channel an estimated R816,2 million of asymmetric payments into Cell C and R34.5 million into Telkom Mobile by "asymmetric payment" I mean the excess payment caused by paying the asymmetrical rate to terminate calls on the Cell C or Telkom mobile network, instead of or rather than paying the same rate to them as the rate charged by MTN to terminate calls on its network. This is shown in the table below:

*Valuation of the asymmetric interconnection payments to Cell C and Telkom Mobile arising from the 2010 Regulations*

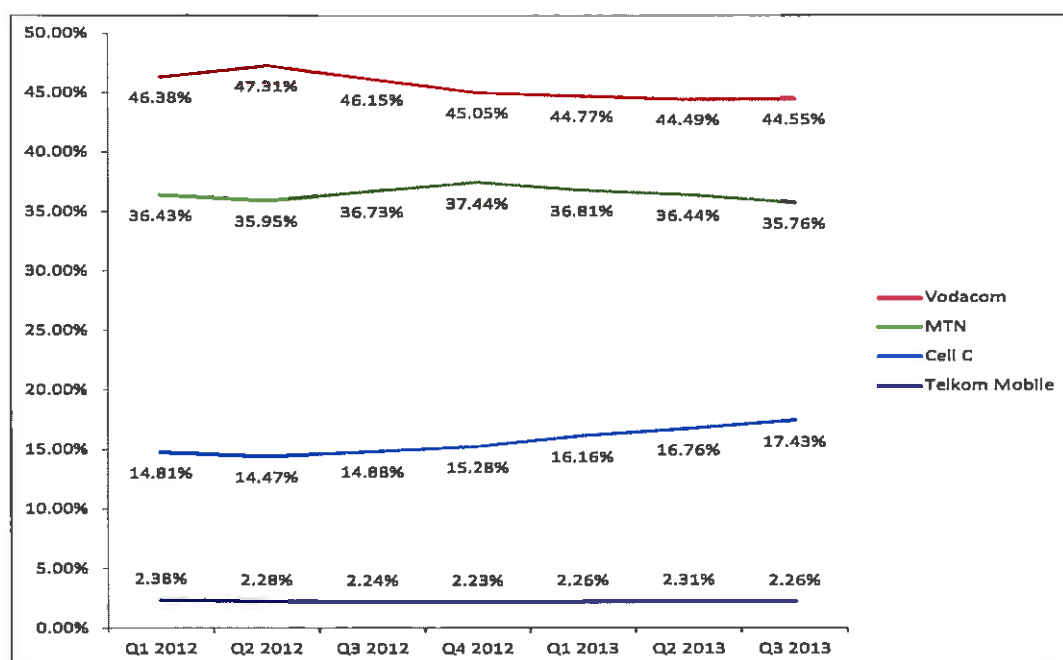
|                               | By MTN to            |                     | By industry (e)      |                     |
|-------------------------------|----------------------|---------------------|----------------------|---------------------|
|                               | Cell C               | Telkom Mobile       | Cell C               | Telkom Mobile       |
| Mar11-Mar12a                  | R 150,899,342        | R 5,520,878         | R 457,270,732        | R 16,729,933        |
| Mar12-Mar13a                  | R 76,897,510         | R 3,473,174         | R 233,022,757        | R 10,524,771        |
| Mar13-Mar14e                  | 41,565,542           | R 2,401,347         | R 125,956,188        | R 7,276,810         |
| <b>Total 2010 Regulations</b> | <b>R 269,362,394</b> | <b>R 11,395,400</b> | <b>R 816,249,678</b> | <b>R 34,531,514</b> |

a=actual, e=estimated; industry figures assume MTN represents 33% of total traffic into Cell C and Telkom Mobile

40.2 One measure of the positive effects of the 2010 Regulations is that Cell C appears to have substantially increased its market share during the period of operation of the 2010 Regulations (measured in

subscriber volumes, and based on press statements from Cell C and industry commentators estimates). This is apparent from Figure 1 below:

*Figure 1: Market Shares – South African MNOs Q1 2012 – Q3 2013*



Source: GSMA database

### ***The position after 1 March 2014***

41 The 2014 Regulations were published on 4 February 2014. I attach marked "ZB 2" a copy of the 2014 Regulations, together with the Explanatory Note that accompanied the Regulations.

42 Regulation 3 defines the same two markets as in the 2010 Regulations.

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- 43 Regulations 4 and 5 determine that competition in the wholesale voice call termination markets is ineffective.
- 44 Regulation 6 determines that each licensee that offers wholesale voice call termination services has significant market power in its own market.
- 45 Regulation 7 identifies "inefficient pricing" as the cause of market failure in the wholesale voice call termination markets. Regulation 7(2) imposes pro-competitive terms and conditions on all licensees so as to overcome these market failures. One of these terms involves the obligation to "charge fair and reasonable prices consistent with Appendix A" (regulation 7(2)).
- 46 Regulation 7(3) determines that "additional pro-competitive terms and conditions" are necessary in relation to MTN and Vodacom in Market 1. The "additional pro-competitive terms and conditions" imposed on MTN and Vodacom are listed in regulation 7(3). For present purposes, Regulation 7(4)(a) is of particular importance. It provides that, for the period 1 March 2014 to 1 March 2016, MTN and Vodacom will be obliged to charge the wholesale voice call termination rates specified in Table 1. Table 1 provides as follows:

|              |       |
|--------------|-------|
| 1 March 2014 | R0.20 |
| 1 March 2015 | R0.15 |
| 1 March 2016 | R0.10 |

- 47 In effect, Table 1 continues the descent in terms of the glide-path that commenced in the 2010 Regulations.

48 However, the glide-path in Table 1 does not apply to Cell or to Telkom Mobile.

Their call termination rates are regulated by Appendix A:

48.1 Paragraph 1.2 of Appendix A provides that, in general, licensees must charge "reciprocal rates with the rate set for MTN and Vodacom" in Market 1.

48.2 Paragraph 1.3 of Appendix A provides that mobile operators other than MTN and Vodacom (i.e. Cell C and Telkom Mobile) may charge higher mobile termination fees than those specified in Table 1 in the following circumstances:

48.2.1 If the licensee has "less than 20% of total retail revenue in the relevant market as of December 2012", it "qualifies for any asymmetric rate" for a period of three years from 1 March 2014.

48.2.2 After 1 March 2017, such a licensee "qualifies for an ongoing asymmetric rate" if it has "a retail revenue share of less than or equal to 10% of total revenue in the relevant market". Footnote 1 makes it plain that "the R0.20 asymmetry rate will continue indefinitely for qualifying licensees in Market 1, that is for those with less than 10% market share by revenue in the mobile market".

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48.3 Paragraph 2.4 imposes a cap on the asymmetrical rate that may be charged. Table A1 provides for the following "maximum asymmetry rates" in the case of Market 1:

|              |       |
|--------------|-------|
| Current rate | R0.44 |
| 1 March 2014 | R0.44 |
| 1 March 2015 | R0.42 |
| 1 March 2016 | R0.40 |
| 1 March 2017 | R0.20 |

48.4 Significantly and as appears from the table below, the amount of the value of asymmetry and its progressive impact is startling.

|              | Maximum<br>asymmetry rates | MTN / Vodacom<br>termination<br>rates | Asymmetry<br>value | Asymmetry<br>% |
|--------------|----------------------------|---------------------------------------|--------------------|----------------|
| 1 March 2014 | R0.44                      | R0.20                                 | R0.24              | 120%           |
| 1 March 2015 | R0.42                      | R0.15                                 | R0.27              | 180%           |
| 1 March 2016 | R0.40                      | R0.10                                 | R0.30              | 300%           |

## THE PROCESS PRECEDING THE PUBLICATION OF THE 2014 REGULATIONS

49 I turn now to describe the process that preceded the publication of the 2014 Regulations.

### ***The Cost to Communicate Programme***

- 50 On 4 June 2013, ICASA published in Government Notice 574 of 2013 notice of its intention to implement a "cost to communicate programme". A copy of the notice is annexed marked "ZB 3".
- 51 Paragraph 6 gave formal notice of a review of the 2010 Regulations. It stated that ICASA would review the 2010 Regulations in terms of section 67(8) of the ECA, but that "the review will not consider revisions of either the market definitions or SMP [i.e. significant market power] determinations as these will not have changed".

### ***The Draft Regulations***

- 52 On 11 October 2013, ICASA published Draft Call Termination Regulations in Government Notice 1018 of 2013 ("the Draft Regulations"). A copy of the Draft Regulations is attached marked "ZB 4", together with the explanatory note that accompanied the Draft Regulations.
- 53 For present purposes, it is necessary to draw attention to two aspects of the Draft Regulations.
- 54 *First:* the Draft Regulations provided for a glide-path in Table 1 that would continue the descent initiated by the 2010 Regulations. The glide-path would require MTN and Vodacom to charge the following wholesale call termination rates to a mobile location:

|              |       |
|--------------|-------|
| 1 March 2014 | R0.20 |
|--------------|-------|



|              |       |
|--------------|-------|
| 1 March 2015 | R0.15 |
| 1 March 2016 | R0.10 |

55 *Second:* the Draft Regulations provided that licensees other than MTN and Vodacom (i.e. Cell C and Telkom Mobile) would be entitled to charge asymmetric termination rates in certain circumstances. Table A1 provided for the following table of "maximum asymmetric rates" in the case of Market 1:

|              |       |
|--------------|-------|
| 1 March 2014 | R0.39 |
| 1 March 2015 | R0.33 |
| 1 March 2016 | R0.26 |
| 1 March 2017 | R0.20 |
| 1 March 2018 | R0.14 |
| 1 March 2019 | R0.10 |

#### ***Interaction between MTN and ICASA regarding the Draft Regulations***

56 On 8 October 2013, ICASA addressed a letter to MTN inviting MTN to attend a "one-on-one meeting" with ICASA. The letter stated that the purpose of the meeting was "to afford stakeholders the opportunity to seek clarifications on the draft regulations and to make any relevant representations". The letter made it plain that the meeting was "scheduled to last no longer than one hour". A copy of the letter is annexed marked "ZB 5".



57 MTN replied to ICASA on 25 October 2013. A copy of MTN's letter is annexed marked "ZB 6". MTN accepted ICASA's meeting invitation, but requested that the meeting be extended for longer than one hour. MTN also requested that ICASA furnish it in advance of the meeting with:

57.1 the costing study undertaken by ICASA to arrive at the call termination rates proposed in the Draft Regulations;

57.2 the rationale for ICASA's "radical departure from the 2010 Call Termination Regulations";

57.3 any analysis conducted by ICASA of the financial impact of the Draft Regulations on MTN or of the proportionality of the proposed remedy; and

57.4 any global or regional benchmarking study used by ICASA in support of the proposed rates and asymmetry in the Draft Regulations.

58 On 4 November 2013, ICASA replied to MTN by means of a curt letter that is annexed marked "ZB 7". The letter did not respond to any of MTN's requests for clarification or for documentation, and refused to extend the meeting beyond one hour.

59 On 7 November 2013, representatives of MTN and ICASA held a one-on-one meeting at ICASA's offices:

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- 59.1 The meeting was attended by six representatives of MTN and six representatives of ICASA. I was one of those who attended the meeting on behalf of MTN.
- 59.2 The meeting lasted from 9 am to 10.15 am.
- 59.3 At the commencement of the meeting, MTN handed to ICASA a 36-page slide presentation on the Draft Regulations. A non-confidential version of the presentation is annexed to my affidavit marked "ZB 8". Parts of the presentation have been redacted because the information contained therein is commercially sensitive and confidential to MTN (in this regard, see in particular, slides 5, 6, 7, 12, 14 and 15). Subsequently, and on 22 November 2013, when MTN provided ICASA with its detailed submissions, MTN included copies of an additional 4 slides following on from the slide presentation already furnished. These additional slides were numbered 36 to 39. Copies of these additional slides are annexed to my affidavit marked "ZB 9". I point out that parts of these additional slides have been redacted because the information contained therein is commercially sensitive and confidential to MTN.
- 59.4 Philisiwe Sibiya of MTN and I spoke to the presentation for about an hour. We emphasised that MTN was unable to engage with the proposed termination rates since ICASA had declined to make available to MTN the cost data on which the termination rates were supposedly based.

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59.5 At the end of the MTN presentation, Councillor Stucke of ICASA said that MTN had not meaningfully engaged with ICASA. He stated in inexplicably intemperate language that MTN had "insulted ICASA's intelligence" by not addressing what it had been asked to request and by not submitting any "counter-proposals".

59.6 Following Councillor Stucke's outburst, Councillor Batyi acknowledged that ICASA's letter of 4 November 2013 inviting MTN to discuss "MTN's views on the implications of the proposed termination regulations on [MTN's] business in South Africa" may have misled MTN as to what ICASA really wanted to address at the one-to-one meeting. She then proposed that a new meeting should take place. In doing so, she acknowledged the parties had completely missed one another at the meeting.

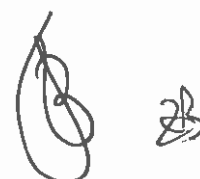
60 On 15 November 2013, MTN addressed to ICASA the letter that is annexed marked "ZB 10". The letter summarised what had occurred at the meeting held on 7 November 2013, and recorded that "despite MTN's requests at the meeting, we note that the Authority will not be sharing with MTN any of the cost data or cost modelling it used to reach the proposed rates". The letter recorded that ICASA had suggested that a new meeting should take place in the first week of December 2013, and pointed out that ICASA had not yet invited MTN to such a meeting. The letter concluded that MTN looked forward to receiving the invitation from ICASA and a detailed agenda for the meeting.

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- 61 On 22 November 2013, MTN made detailed submissions to ICASA regarding the Draft Regulations. A copy of the non-confidential version of MTN's submissions to ICASA is attached marked "ZB 11".
- 62 On 28 November 2013, ICASA responded to MTN's letter of 15 November 2013 by means of the letter that is annexed marked "ZB 12". The letter stated that ICASA was reviewing MTN's submissions on the Draft Regulations, and would inform MTN if it required "further consultations as undertaken in our meeting of 7 November 2013".
- 63 ICASA did not invite MTN to any further meeting. On the contrary, on 28 January 2014, ICASA wrote to MTN and advised that it "has considered all inputs in this regard and deems it unnecessary to meet with MTN." A copy of ICASA's letter is attached marked "ZB12(a)".

#### ***Publication of the 2014 Regulations***

- 64 On 29 January 2014, ICASA held a press conference at which it announced the final Call Termination Regulations for 2014. At the press conference, the Chairperson of ICASA made the presentation that is annexed marked "ZB 13". No further details of the Regulations were made available.
- 65 The 2014 Regulations were published in the Government Gazette a week later on 4 February 2014. I have described the content of the Draft Regulations above. For present purposes, I emphasise that the glide-path in the 2014 Regulations is the same as the glide-path in the Draft Regulations. However, the table of "maximum asymmetry rates" in the 2014 Regulations differs

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significantly from the equivalent table in the Draft Regulations since the amount of asymmetry in the first three years is much higher than had been proposed in the Draft Regulations. This means that the 2014 Regulations will have an even more prejudicial impact on MTN than the Draft Regulations.

## **THE 2014 REGULATIONS ARE UNLAWFUL**

66 I turn now to indicate the basis on which the 2014 Regulations are unlawful and should be reviewed.

### ***The legal basis for the review***

67 I am advised that the 2014 Regulations constitute administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), *alternatively* that the decision of ICASA to make the 2014 Regulations constitutes administrative action in terms of PAJA.

68 If the 2014 Regulations or ICASA's decision to promulgate the 2014 Regulations do not constitute administrative action in terms of PAJA, I submit that they nevertheless fall to be reviewed and set aside on the basis that they are inconsistent with the constitutional principle of legality.

### ***Defects in the process***

69 ICASA jumped the gun when it initiated the review of the 2010 Regulations. The Explanatory Note to the 2010 Regulations stated that "the intention is for the Authority to review the above rates [i.e. the glide-path] for amendment after 1 March 2014". Regulation 8 of the 2010 Call Termination Regulations stated

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that a review of the call termination markets will take place "after a minimum period of three (3) years from the publication of these regulations" [my emphasis]. This meant that a review in terms of Regulation 8 could only start on 29 October 2013. However, the Draft 2014 Regulations were published on 11 October 2013. ICASA therefore commenced its review process prematurely and in a manner that was inconsistent with Regulation 8 of the 2010 Call Termination Regulations.

- 70 In order to undertake a review of the pro-competitive conditions imposed by the 2010 Regulations, ICASA was required to follow the process described in section 67(8)(a) of the ECA. This required ICASA to review the market determinations made on the basis of its 2010 analysis, and to decide whether to modify the pro-competitive conditions. ICASA failed to do so. Instead, the 2014 Regulations and Explanatory Note mirror the 2010 Regulations in structure and approach (definition of the relevant markets, competitive assessment, SMP determination, pro-competitive terms and conditions). Regulation 2 provides the most obvious illustration of this, since it sets out the purpose of the 2014 Regulations in substantially the same terms as contained in Regulation 2 of the 2010 Regulations. All of this makes it plain that ICASA began its market analysis afresh in terms of section 67(4) of the ECA, and did not review its existing findings as required by section 67(8). As I shall indicate below, this had the result that ICASA failed to apply its mind to the proportionality enquiry mandated by section 67(8)(c).

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71 I accordingly submit that the 2014 Regulations (alternatively ICASA's decision to make the 2014 Regulations) should be reviewed and set aside the grounds that:

71.1 a mandatory and material procedure or condition prescribed by an empowering provision was not complied with (as contemplated by section 6(2)(b) of PAJA);

71.2 they are otherwise unlawful (as contemplated by section 6(2)(i) of PAJA).

72 If the 2014 Regulations or ICASA's decision to make the 2014 Regulations do not amount to administrative action in terms of the PAJA, then the 2014 Regulations should be reviewed and set aside on the basis that they contravene the constitutional principle of legality.

***Lack of procedural fairness***

73 ICASA did not comply with the requirements of procedural fairness when it made the 2014 Regulations.

74 I have already indicated that, despite repeated requests, ICASA did not grant MTN access to the underlying cost data on which ICASA relied for the glide-path and asymmetrical rates in the Draft Regulations. MTN was not furnished with any of the cost modelling allegedly used by ICASA to derive its target termination rates and the proposed asymmetry levels. This was grossly unfair, since it meant that MTN was deprived of any opportunity to engage meaningfully with ICASA.

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75 ICASA afforded MTN a single, one-on-one meeting before the 2014 Regulations were made. I have described this meeting above. The meeting did not afford MTN a meaningful opportunity to be heard, and did not comply with the requirements of procedural fairness.

76 I have already indicated that the maximum asymmetry rates in the 2014 Regulations differ significantly from the maximum asymmetry rates in the Draft Regulations. Although this has a massive impact on its business, MTN was not afforded any opportunity to comment on the change. Remarkably, the first time that MTN learned of the revised asymmetry rates was when ICASA held its press conference on 29 January 2014.

77 I accordingly submit that the 2014 Regulations (alternatively ICASA's decision to make the 2014 Regulations) should be reviewed and set aside the grounds that:

77.1 ICASA's conduct was procedurally unfair within the meaning of section 6(2)(c) read with section 3 of PAJA; alternatively

77.2 ICASA's conduct was procedurally unfair within the meaning of section 6(2)(c) read with section 4 of PAJA.

78 If the 2014 Regulations or ICASA's decision to make the 2014 Regulations do not amount to administrative action in terms of the PAJA, then the 2014 Regulations should be reviewed and set aside on the basis that they contravene the constitutional principle of legality.



***ICASA's determination of ineffective competition***

79 Regulation 4 states that ICASA applied the methodology summarised therein in order to determine the effectiveness of competition. Regulation 4(a) refers to the Hypothetical Monopolist Test. The Hypothetical Monopolist Test involves understanding the impact of a 10% price increase on a hypothetical monopolist's profits, in order to infer market boundaries from supply substitutes. This is a complex exercise that requires empirical evidence and analytical judgment. However, there is no evidence to suggest that such an exercise was ever performed by ICASA.

80 Regulation 5 states that ICASA determined "that competition in the wholesale voice call terminations markets ... is ineffective". Regulation 7(1) goes further, since it states that ICASA has determined "inefficient pricing as the cause of the market failure in the respective wholesale voice call termination markets". I make the following observations regarding ICASA's finding that the cause of market failure was "inefficient pricing":

80.1 The pricing that has applied in the market for the past three years was the pricing prescribed by the 2010 Regulations. If ICASA was of the view that this regulatory regime has produced market failure in the form of "inefficient pricing", then it would be irrational for ICASA to perpetuate such market failure in the form of the 2014 Regulations.

80.2 In its submissions on the Draft Regulations, MTN pointed out that it would make little sense for ICASA to find that the 2010 Regulations





have produced "inefficient pricing" and then to continue such "inefficient pricing" for another three years.

80.3 ICASA has sought to meet this criticism in paragraph 5 of the Explanatory Note to the 2014 Regulations. There ICASA states that "the market failure arose as a result of the use of different costing methodologies as used by the Authority in the 2010 Regulations". ICASA explains that in the 2010 Regulations, it used the Fully Allocated Cost Methodology to calculate mobile termination rates and it used the Long Run Incremental Cost Methodology to calculate fixed-line termination rates. This is said to have "created a distortion in the termination rates payable in and between the two markets". I make the following submissions regarding this explanation:

80.3.1 Regulation 7(1) of the 2014 Regulations states that ICASA has "identified inefficient pricing as the cause of the market failure in the respective wholesale voice call termination markets". It is implausible to suggest that this means that ICASA has identified the cause of market failure as being the fact that different methodologies were used to calculate mobile termination rates and fixed-line termination rates in the 2010 Regulations.

80.3.2 However, if this is indeed what ICACA found, it would mean that the pro-competitive measures in the 2014 Regulations are not targeted at the market failure identified by ICASA. I shall elaborate below on the reasons for this.



81 I accordingly submit that the 2014 Regulations (alternatively ICASA's decision to make the 2014 Regulations) should be reviewed and set aside the grounds that:

81.1 a mandatory and material procedure or condition prescribed by an empowering provision was not complied with (as contemplated by section 6(2)(b) of PAJA);

81.2 they are arbitrary (as contemplated by section 6(2)(e)(vi) of PAJA:

81.3 they are unreasonable (as contemplated by section 6(2)(h) of PAJA).

82 If the 2014 Regulations or ICASA's decision to make the 2014 Regulations do not amount to administrative action in terms of the PAJA, then the 2014 Regulations should be reviewed and set aside on the basis that they contravene the constitutional principle of legality.

### ***ICASA's market definition***

83 Regulation 3(a) of the 2014 Regulations defines Market 1 as "the market for wholesale voice call termination services to a mobile location on the network of each ECS/ECNS licensee who offers such a service within the Republic". It is apparent from this definition that ICASA has taken the view that each licensee offering call termination services has a 100% market share in its call termination market.

84 However, a different market definition is adopted elsewhere in the 2014 Regulations:

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- 84.1 Regulation 7(3)(b) refers to licensees who maintain "a share of retail market revenue generated in the respective markets of greater than 20 per cent as of December 2012".
- 84.2 Paragraph 2.1 of Appendix A provides that a licensee qualifies for an asymmetric rate "if it is has less than 20% of total retail revenue in the relevant market as of December 2012".
- 84.3 Paragraph 2.2 of Appendix A provides that "a licensee qualifies ... for an ongoing asymmetric rate of R0.20 if it has a retail revenue market of less than or equal to 10 per cent of total retail revenue in the relevant market".
- 85 These provisions cannot refer to the wholesale market for call termination, since ICASA has already taken the view that each licensee has a market share of 100% in the market for call termination. In any event, it would be nonsensical to talk of "retail revenue" in the case of a wholesale market. These provisions of the 2014 Regulations must therefore refer to some other market. However, it is not apparent what that market is or how market share is to be calculated.
- 86 The equivalent provisions of the Draft Regulations referred to "share of total minutes terminated in the relevant markets" rather than to "share of total retail revenue in the relevant markets". In its submissions on the Draft Regulations, MTN contended that it was not apparent what was meant by "share of total minutes terminated in the relevant markets". The Explanatory Note to the 2014 Regulations seeks to meet this criticism by stating that ICASA has "reverted to the principles applied in the 2010 Call Termination Market Review (GG 33698)



wherein retail market revenue share was the metric in use" (para 5.10). I make the following submissions regarding this explanation:

86.1 This explanation confirms that ICASA has adopted a schizophrenic approach to market definition. This is because ICASA alternates between two competing market definitions: the first is a wholesale market for call termination in which each operator has a 100% market share, and the second is a retail market in which each operator competes for revenue share from end-users. The use of competing market definitions is internally contradictory and irrational.

86.2 But in any event, it is not apparent from the 2014 Regulations what is the relevant "retail market" or how "retail revenue market share" is to be calculated. For example, it is not apparent whether retail revenue shares are to be calculated:

- on the basis of voice revenue only, or on the basis of voice, SMS and data revenue;
- on the basis of revenue from mobile services only, or from mobile telecommunications and fixed-line services;
- on the basis of revenue from national calls only, or from national calls and international calls;
- on the basis that revenue is to be included or excluded when it derives from the sale of devices (handsets and laptops), or

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from the provision of Value-Added Services and content services;

- on the basis that revenue is to be included or excluded when the end-user's contractual relationship is with a Service Provider rather than with a Mobile Operator.

86.3 Since the reference to "retail revenue market share" is a new feature of the 2014 Regulations that was not included in the 2010 Regulations or the Draft Regulations, MTN was never afforded an opportunity to explain to ICASA that the term has no readily ascertainable meaning.

87 I accordingly submit that the 2014 Regulations (alternatively ICASA's decision to make the 2014 Regulations) should be reviewed and set aside the grounds that:

87.1 they are void for vagueness, and are therefore unlawful within the meaning of section 6(2)(i) of PAJA;

87.2 they are arbitrary (as contemplated by section 6(2)(e)(vi) of PAJA:

87.3 they are unreasonable (as contemplated by section 6(2)(h) of PAJA).

88 If the 2014 Regulations or ICASA's decision to make the 2014 Regulations do not amount to administrative action in terms of the PAJA, then the 2014 Regulations should be reviewed and set aside on the basis that they contravene the constitutional principle of legality.

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***The imposition of additional pro-competitive terms on MTN and Vodacom***

89 Regulation 7(3) provides that ICASA has determined that "additional pro-competitive terms and conditions are necessary" for MTN and Vodacom in relation to Market 1. These terms and conditions include the glide-path in Table 1. I submit that the imposition of the glide-path on MTN (and Vodacom) is irregular for the following reasons.

**Regulation 7(3) is void for vagueness**

90 Regulation 7(3) refers to licensees "that benefit from economies of scale and scope in maintaining a share of retail market revenue generated in the respective markets of greater than 20 per cent as of December 2012". I have already indicated that this is inconsistent with ICASA's earlier finding that all licensees have 100% market share in the market for call termination. Regulation 7(3) must therefore refer to some other market, but does not indicate with adequate precision what that market is or how the relevant market share is to be calculated. The reasons for this have been given above.

91 Regulation 7(3) is accordingly void for vagueness.

**The glide-path in Regulation 7(4) is not "cost-oriented"**

92 Table 1 in Regulation 7(4) contains a glide-path for wholesale voice call termination rates to a mobile location.

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93 Paragraph 1.1 of Appendix A provides that "for the purposes of regulation 7(2)(a), 'fair and reasonable' prices are rates that are equivalent to the cost-oriented rates imposed on the [MTN and Vodacom]".

94 It follows that the call termination rates in Table 1 purport to be "cost-oriented". In other words, they purport to represent the costs of terminating a call on a mobile network.

95 This much was made clear in paragraph 5.3 of the Explanatory Note to the Draft Regulations, which stated that "ICASA determines that the cost of termination in Market 1 is now approximately R0.10 per minutes based on, amongst others, the increase in traffic on licensees' networks". This statement has been omitted from the Explanatory Note to the 2014 Regulations. However, its omission does not alter the fact that ICASA must have found that the cost of termination in Market 1 was 10 cents. Unless ICASA had made such a finding, the rates in the glide-path could not be said to be "cost-oriented".

96 I submit that there was simply no basis on which ICASA could justifiably have found that that the cost of termination in Market 1 is 10 cents. I make this submission for the reasons that follow.

97 No cost data has been filed with ICASA by MTN since its last COA/CAM submission in 2008 was used to set the target rate of 40c in the 2010 Regulations. In this regard, I point out that the Call Termination Questionnaire that was addressed by ICASA to MTN on 10 June 2013 focused on retail and

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termination traffic or revenues; it could not provide the basis for a cost study (since no cost information was requested or provided).

98 ICASA has never required licensees to submit COA/CAM reports under the 2010 Regulations:

98.1 Regulation 7(5)(c) of the 2010 Regulations required the licensees identified in regulation 7(4) to "submit regulatory financial reports in line with the format prescribed in the Accounting Separation and Cost Accounting Regulations to be prescribed by ICASA".

98.2 However, ICASA failed to prescribe the Accounting Separation and Cost Accounting Regulations envisaged by Regulation 7(5)(c).

98.3 In the result, ICASA could not have been in possession of any accounting data allowing it to determine that the cost of termination in Market 1 is now 10 cents per minute.

99 Regulation 7(4)(b) provides that licensees are obliged to provide information to ICASA if this is necessary to develop a LRIC Cost Model. In other words, Regulation 7(3)(b) contemplates the very cost-based exercise that ICASA was required to perform before it made the 2014 Regulations. Since the rates in Table 1 purport to be "cost-oriented", it is irrational for ICASA to say that it will require information from licensees in the future in order to develop a LRIC Cost Model.

100 Although the details are confidential, I can state that MTN has invested many billions of rands in its voice network since 2010 in order to cater for voice

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coverage and capacity improvements (see also paragraph 38.3 above) . Any cost-oriented rate must take account of this incremental investment. There is nothing to suggest that ICASA has done so. In addition to the capital expenditure in the voice network, it is unclear whether ICASA took account of the increase in operating expenditure associated with its voice network since MTN last filed cost information with ICASA. This expense will be sensitive to CPI and traffic volume increases in the MTN voice network.

101 The manner in which ICASA has altered the call termination rates in Market 2 puts it beyond doubt that that there is no empirical basis for its findings in Market 2 of Market 1:

101.1 The Draft Regulations stated that, with effect from 1 March 2016, the call termination rate to a mobile location would be 10c and the call termination rate to a fixed location would be between 12c and 19c. The necessary implication of this was that ICASA had found that terminating a call on a mobile network (with a traffic sensitive "last-mile") cost less than terminating a call on a fixed network (with a copper "last-mile" that is largely traffic-insensitive). Such a finding would be unprecedented in the regulatory world.

101.2 In its submissions on the Draft Regulations, MTN drew attention to the implausibility of ICASA's conclusion that the cost of terminating a call in Market 1 (10c) was lower than the cost of terminating a call in Market 2 (12-19c).

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101.3 The 2014 Regulations seek to avoid this criticism by providing in Table 2 that the wholesale call termination rate to a fixed location after 1 March 2016 will be 10c. In other words, ICASA has at the stroke of a pen abandoned its earlier finding that the cost of terminating a call in Market 1 (10c) is lower than the cost of terminating a call in Market 2 (12-19c). ICASA's abrupt about-turn makes it plain that there can be no empirical basis for its findings regarding the cost of termination in Market 2. Just as there was no empirical basis for ICASA's "old finding" that the cost of terminating a call in Market 2 was 12c to 19c, there is no empirical basis for ICASA's "new" finding that the cost of terminating a call in Market 2 is 10c. ICASA does not suggest that it performed a "new" costing exercise when it reduced the call termination rate in Market 2 by a stroke of the pen.

102 The Explanatory Note to the 2014 Regulations states that ICASA "applied a LRIC-based financial model to determine the termination rates for both Markets 1 and 2" based on "information available to the Authority". (para 5.3). For the reasons set out above, I submit that there is simply no basis for these statements and that the call termination rates in Table 1 are nothing more than a thumb-suck. There is no basis on which ICASA could plausibly have concluded that the rates in Table 1 represent the costs of terminating a call on a mobile network.

The glide-path in Regulation 7(4) is unreasonable and disproportionate



103 In addition to what is stated above, the glide-path in Regulation 7(4) is unreasonable and disproportionate for the following reasons.

104 *First*, the glide-path does not comply with the principle of proportionality in section 67(8)(c) of the ECA:

104.1 In the 2010 Regulations, ICASA determined four market failures: lack of access; discrimination; lack of transparency; and inefficient pricing. However, the 2014 Regulations identify a single market failure: inefficient pricing. This indicates that ICASA has formed the view that competition has become more effective in the past three years. However, the 2014 Regulations fly in the face of this conclusion by imposing more onerous pro-competitive conditions on MTN.

104.2 This does not comply with the requirement of proportionality in section 67(8)(c) of the ECA.

105 *Second*, the glide-path is not directed at correcting the market failure allegedly identified by ICASA:

105.1 Regulation 7(3) states that the pro-competitive terms are imposed on MTN because they are "necessary to correct the market failures identified in Regulation (1)".

105.2 The market failure identified in Regulation 7(1) is "inefficient pricing".

105.3 The meaning of "inefficient pricing" is explained in Paragraph 5 of the Explanatory Note to the 2014 Regulations, where ICASA states that

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"the market failure arose as a result of the use of different costing methodologies as used by the Authority in the 2010 Regulations". ICASA says that in the 2010 Regulations, it used the Fully Allocated Cost Methodology to calculate the mobile termination rate and it used the Long Run Incremental Cost Methodology to calculate the fixed-line termination rates. This "created a distortion in the termination rates payable in and between the two markets".

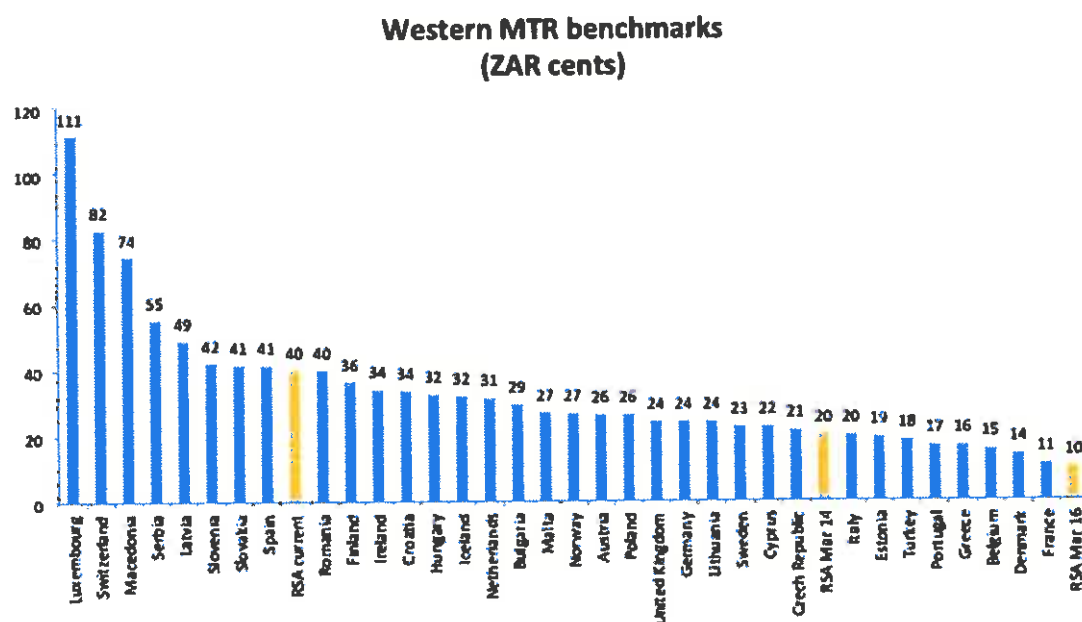
105.4 The glide-path in the 2014 Regulations is manifestly not targeted at the fact that the 2010 Regulations created a "distortion" in the termination rates payable in Market 1 and Market 2. It goes much further than this. Indeed, at the press conference held on 29 January 2014 to announce the 2014 Regulations (annexure "ZB 13" referred to earlier) ICASA indicated that it intends the reduction in wholesale call termination rates to produce a reduction in retail call rates. It follows that the glide-path is not justifiably related to the reasons given by ICASA for implementing further reductions in mobile termination rates.

106 *Third*, the glide-path is irrational and unreasonable because it is at odds with international bench-marking:

106.1 The Explanatory Note to the 2014 Regulations states that "benchmarking was carried out" by ICASA when it determined the glide path (para 5.3). For the reasons that follow, I dispute that the proposed 10c target rate is justifiable on the basis of global or regional benchmarking.

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106.2 The figure below shows how the glide-path in the 2014 Regulations will position South Africa relative to a pool of Western European benchmarks (the weighted average of which amounts to R0.25). It was compiled using information contained in Integrated Report on Mobile Termination Rates, Fixed Termination Rates & SMS Termination Rates, published by the Body of European Regulators for Electronic Communications, June 2013, a copy of which is annexed marked "ZB 14" ("the BEREC Report") (An exchange rate of R13/€ was used.)



106.3 Looking at regional (African) benchmarks, ICASA's proposal is also unreasonable. The following table (which appears in the slide presentation given to ICASA - slide 23 of annex "ZB 8") shows

regional mobile call termination benchmarks in other African countries:

|              | 2013  | 2014  | Glide path Target (date) |
|--------------|-------|-------|--------------------------|
| Botswana     | R0.41 | R0.35 |                          |
| Tanzania*    | R0.22 | R0.20 | R0.17 (2017)             |
| Kenya        | R0.13 | R0.12 |                          |
| Namibia      | R0.30 |       |                          |
| Nigeria*     | R0.30 | R0.27 | R0.24 (2015)             |
| Ghana        | R0.21 | R0.18 |                          |
| South Africa | R0.40 | R0.20 | R0.10 (2016)             |

106.4 I attach marked "ZB 15", a copy of a press release dated 29 January 2013 issued by the United Republic of Tanzania - Tanzania Communications Regulatory Authority. The press release relates to the decision on interconnection rates in Tanzania, more particularly interconnection determination No 3 issued in 2013 ("the Press Release"). I also attach marked "ZB 16" a copy of the determination of voice interconnection rates issued by the Nigerian Communications Commission on 20 March 2013 ("the NCC Determination"). A reading of paragraph 1 of the Press Release together with paragraphs 16 to 21 of the NCC Determination makes it clear that the rates in Tanzania and Nigeria were derived using the LRIC costing methodology proposed by ICASA, using models developed by PriceWaterhouseCoopers.



107 *Fourth*, the glide-path is unreasonable in terms of its effects on MTN:

107.1 The contribution of interconnection to the MTN business (the "interconnection margin"), as defined above, is currently in the region of R275 million. This contribution is made of two components. The revenues generated by MTN from interconnection fees ("interconnection revenues"), minus the payment of interconnection fees by MTN to other operators ("interconnection costs").

107.2 MTN estimates that the impact of the 2014 Regulations on MTN's interconnection margin will be nothing short of dramatic. In the result, the margin will become hugely **negative** within a year and the position will only continue to worsen over time. .

107.3 The extremely adverse financial impact of the glide path on MTN does not stop at the significant reduction in interconnection margin. The steep decline in termination fees (combined with the large asymmetry granted to Cell C and Telkom Mobile) will substantially alter the competitive dynamics in the market, with a large impact on retail market shares and revenues.

108 *Fifth*, the glide-path is unreasonable when compared to the position that applies in Market 2 in relation to Telkom's fixed-line services. ICASA found that *all* voice call termination markets suffer from "inefficient pricing". But although ICASA cut MTN's termination rates by 50% (from 40c to 20c) in the 2014 Regulations, it left call termination rates in Market 2 unchanged for a two-year

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period at their current levels of 12 cents (i.e. at their supposedly "inefficient" level). The 2014 Regulations therefore enshrine, rather than remove, the market failures in Market 2.

### Summation

109 For all of the reasons set out above, the 2014 Regulations (alternatively ICASA's decision to make the 2014 Regulations) should be reviewed and set aside the grounds that:

109.1 relevant considerations were not taken into account and irrelevant considerations were taken into account (as contemplated by section 6(2)(e)(iii) of PAJA);

109.2 they are not rationally related to the purpose of the Regulations, the information before ICASA or the reasons given by ICASA (as contemplated by section 6(2)(f)(ii) of PAJA);

109.3 they are arbitrary (as contemplated by section 6(2)(e)(vi) of PAJA:

109.4 they are unreasonable (as contemplated by section 6(2)(h) of PAJA).

110 If the 2014 Regulations or ICASA's decision to make the 2014 Regulations do not amount to administrative action in terms of the PAJA, then the 2014 Regulations should be reviewed and set aside on the basis that they contravene the constitutional principle of legality.





***Asymmetrical rates for licensees other than MTN and Vodacom***

111 Regulation 7(2) provides that all licensees "must charge fair and reasonable prices consistent with Appendix A". Paragraph 1.1 of Appendix A provides that, for the purposes of Regulation 7(2), "fair and reasonable prices" are equivalent to the cost-oriented rates in the glide-path in Table 1. However, this is qualified by paragraph 2 of Appendix A, which provides that licensees other than MTN and Vodacom may charge higher rates than the glide-path in Table 1 in certain circumstances. A licensee who qualifies for an asymmetric rate in Market 1 is entitled to charge the maximum asymmetry rate specified in Table A1.

112 I submit that these asymmetry provisions are unlawful for the reasons that follow.

**Paragraph 2 of Appendix A is void for vagueness**

113 Paragraph 2.1 of Appendix A provides that a licensee may charge asymmetrical rates if it has "less than 20% of total retail revenue in the relevant market as of December 2012". By virtue of ICASA's earlier market definition, every licensee offering call termination services in South Africa has 100% market share in the market for call termination. Paragraph 2.1 must therefore envisage some other market. However, for the reasons given above paragraph 2.1 does not indicate with sufficient precision what that market is or how market shares are to be calculated. It is therefore void for vagueness.

114 Paragraph 2.1 of Appendix A provides a licensee "qualifies" for an asymmetric rate if it has "less than 20% of total retail revenue in the relevant market as of



December 2012". It is not apparent from paragraph 2.1 who will decide whether a licensee "qualifies" for asymmetry and how disputes regarding "qualification" will be resolved. For example, if Cell were to render an invoice to MTN on the basis of the asymmetric rate and if MTN were to dispute that Cell C "qualifies" for the asymmetric rate, it is not apparent from the 2014 Regulations how such dispute is to be determined. The problem is particularly acute because Cell C does not report its "revenues", and it is therefore impossible for MTN to assess whether Cell C has "less than 20% of total retail revenue in the relevant market". On this ground as well, paragraph 2.1 of Appendix A is void for vagueness.

No justifiable basis for the asymmetry in Table A1

115 Regulation 7(2), read with paragraph 1.1. of Appendix A, means that the cost-oriented remedy applies to all licensees.

116 It follows that, in order for the asymmetry rates in Table A1 to be justifiable, those rates must reflect the increasing cost difference between MTN and the asymmetric players in Market 1 when it comes to terminating calls on their networks.

117 Despite repeated requests, ICASA has declined to furnish MTN with the cost data on which it purportedly relied for this conclusion. No costing analysis is apparent from the Draft Regulations, the 2014 Regulations or the Explanatory Note. I refer to what I have stated above in this regard.

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118 In the absence of any costing data, I respectfully submit that the asymmetry rates in Table A1 are nothing more than a thumb-suck.

119 The arbitrary nature of ICASA's decision is evidenced by the fact that the cost differential between MTN and Vodacom on the one hand and Cell C and Telkom Mobile on the other, will become 24c on 1 March 2014 even though it was only 4c in 2013. There is nothing to suggest that such an increased differential is "cost-oriented".

The asymmetry in Table A1 is arbitrary and irrational

120 The asymmetry in Table A1 is in any event arbitrary and irrational for the following reasons.

121 The first reason is that paragraph 2.1 of Appendix A means that a licensee will qualify for an asymmetric rate if it has the required market share as at December 2012. However, the termination rates will not apply until March 2014 – a full 14 months later. It is irrational to determine eligibility for asymmetry on the basis of December 2012 market shares in circumstances where the new termination rates will only apply in March 2014. It means that a licensee who crosses the 20% threshold after December 2012 but before March 2014, will continue to qualify for an asymmetric rate with effect from March 2014 even though the reason for asymmetry has – on ICASA's own version – ceased to apply.

122 The second reason is that paragraph 2.1 of Appendix A provides that a licensee who qualifies for asymmetry is entitled to charge asymmetrical rates

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for a three-year period even if its market share during this period increases to more than 20%. This is irrational. There is no reason why licensees should continue to receive asymmetrical benefits if the basis for those benefits (i.e. lack of scale and scope) has ceased to exist.

123 The third reason is that paragraph 2.1 of Appendix A refers to a threshold of 20% in the retail market, while paragraph 2.2 envisages that this threshold will reduce to 10% after three years. Since the asymmetry thresholds are intended to reflect "efficient scale and scope", it is irrational to take the view those thresholds can fluctuate over time. In other words, it makes no sense to say that efficient scale is 20% of the relevant market in 2014 but 10% of the relevant market in 2017.

124 The fourth reason is that ICASA has failed to appreciate that the asymmetry rates in Table 1 will apply in perpetuity:

124.1 Paragraph 5.11 of the Explanatory Note to the 2014 Regulations states that "ICASA agrees that the opportunity to benefit from an asymmetrical termination rate cannot be granted in perpetuity" (my emphasis). However, the 2014 Regulations do allow a licensee to benefit from asymmetrical rates in perpetuity. This is made plain by footnote 1 to the 2014 Regulations, which provides that "the R0.20 asymmetry rate will continue to apply indefinitely for qualifying licensees in Market 1, that is for those with less than 10% market share by revenue in the mobile market". ICASA has therefore misdirected itself by providing for perpetual asymmetry in circumstances where it says that it had no intention of doing so.

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124.2 Paragraph 5.11 of the Explanatory Note to the 2014 Regulations states that ICASA's position "is that asymmetry is not an ongoing support mechanism for smaller operators and should be of limited duration" (my emphasis). However, I have already indicated that the asymmetry in the 2014 Regulation is not of limited duration. Again, ICASA has misdirected itself.

125 The fifth reason is that ICASA has failed to deliver on its own recommendation regarding rate symmetry. Paragraph 5.11 of the Explanatory Note to the 2014 Regulations states that ICASA's "recommended approach is that termination rates should tend towards symmetry over time; i.e. there should only be one rate in the market". However, implementation of the 2014 Regulations will lead to the following rates in 2017: 20c (asymmetric mobile rate), 13c (asymmetric fixed rate) and 10c (symmetrical fixed and mobile rate). The 2014 Regulations will therefore not achieve ICASA's stated purpose for "one rate in the market".

126 The sixth reason is that, although the glide path will apply for three years, the asymmetry in Table A1 will continue to apply after the end of the three-year period. This creates a regulatory disconnect that is irrational, since it means that ICASA has locked termination rates in perpetuity for asymmetrical players even though it has only determined MTN's rates for three years. Differently expressed, ICASA has not determined MTN's call termination rate after 1 March 2017, but has nevertheless purported to determine the asymmetric rate that Cell C and Telkom Mobile will be entitled to charge after 1 March 2017. Such an outcome is nothing short of perverse.

The asymmetry in Table A1 is unreasonable and disproportionate

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127 In addition to what is stated above, the asymmetry in Table A1 is unreasonable and disproportionate for the following reasons.

128 *First*, it is not "proportionate" as required by section 67(8)(c) of the ECA:

128.1 In the 2010 Regulations, ICASA determined four market failures: lack of access; discrimination; lack of transparency; and inefficient pricing. However, the Draft Regulations identify a single market failure: inefficient pricing. This indicates that ICASA has formed the view that competition has become more effective in the past three years. However, the Draft Regulations fly in the face of this by imposing more onerous pro-competitive conditions on MTN in relation to asymmetry.

128.2 This does not comply with the requirement of proportionality in section 67(8)(c) of the ECA.

129 *Second*, the asymmetry provisions are not directed at the market failure allegedly identified by ICASA:

129.1 Regulation 7(3) states that pro-competitive terms are imposed on MTN because they are "necessary to correct the market failures identified in Regulation (1)".

129.2 The market failure identified in Regulation 7(1) is "inefficient pricing".

129.3 The meaning of "inefficient pricing" is explained in Paragraph 5 of the Explanatory Note to the 2014 Regulations, where ICASA states that

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"the market failure arose as a result of the use of different costing methodologies as used by the Authority in the 2010 Regulations". ICASA states that in the 2010 Regulations, it used the Fully Allocated Cost Methodology to calculate the mobile termination rate and it used the Long Run Incremental Cost Methodology to calculate the fixed-line termination rates. This "created a distortion in the termination rates payable in and between the two markets".

129.4 The asymmetry provisions in the 2014 Regulations are manifestly not targeted at the fact that the 2010 Regulations created a "distortion" in the termination rates payable in Market 1 and Market 2. It follows that the asymmetry in the 2014 Regulations is not rationally related to the reasons given by ICASA for implementing asymmetry in the first place.

130 *Third*, the asymmetry is unreasonable because it is at odds with international bench-marking. The levels of asymmetry are substantially higher than those seen in a pool of asymmetric jurisdictions in Europe, averaging 4c. ICASA has made no attempt to show why it considers that substantially higher levels of asymmetry are required and justifiable in South Africa:

130.1 As appears from the BEREC Report, the table below compares the number of symmetrical and asymmetrical jurisdictions in a sample of 34 countries studied by the Body of European Regulators for Electronic Communications in June 2013:

|                                 |
|---------------------------------|
| 34 countries dataset from BEREC |
|---------------------------------|




| Symmetric Mobile Termination Rates | Asymmetric Mobile Termination rates      |
|------------------------------------|--|
| 1 Austria                          | 1 Bulgaria                               |
| 2 Belgium                          | 2 Switzerland                            |
| 3 Czech Republic                   | 3 Cyprus                                 |
| 4 Germany                          | 4 Spain                                  |
| 5 Denmark                          | 5 France*                                |
| 6 Estonia                          | 6 Italy                                  |
| 7 Greece                           | 7 Lithuania                              |
| 8 Finland                          | 8 Luxembourg                             |
| 9 Croatia                          | 9 Latvia                                 |
| 10 Hungary                         | 10 Former Yugoslav Republic of Macedonia |
| 11 Ireland                         | 11 Turkey                                |
| 12 Iceland                         |  |
| 13 Malta                           |  |
| 14 Netherlands                     |  |
| 15 Norway                          |  |
| 16 Poland                          |  |
| 17 Portugal                        |  |
| 18 Romania                         |  |
| 19 Serbia                          |  |
| 20 Sweden                          |  |
| 21 Slovenia                        |  |
| 22 Slovakia                        |  |
| 23 United Kingdom                  | * asymmetry removed July 2013            |

130.2 As appears from the BEREC Report, the table below calculates the weighted average (by subscribers) asymmetry in the pool 11 asymmetrical countries highlighted in the table immediately above:

| Country     | Asymmetry level €<br>cts/min | Asymmetry<br>(%) |
|-------------|------------------------------|------------------|
| Bulgaria    | 0.01                         | 0.3%             |
| Switzerland | 1.45                         | 25.0%            |
| Cyprus      | 1.08                         | 62.9%            |
| Spain       | 0.20                         | 6.3%             |



|   |             |            |
|---|-------------|------------|
| France                                    | 0.30        | 37.5%      |
| Italy                                     | 0.20        | 13.3%      |
| Lithuania                                 | 0.21        | 11.9%      |
| Luxembourg                                | 2.35        | 28.7%      |
| Latvia                                    | 5.17        | 138.5%     |
| Former Yugoslav Republic of Macedonia     | 1.63        | 33.3%      |
| Turkey                                    | 0.20        | 14.6%      |
| <b>Weighted average asymmetry (€ cts)</b> | <b>0.33</b> | <b>20%</b> |
| <b>Weighted average asymmetry (Rand)</b>  | <b>0.04</b> | <b>20%</b> |

131 *Fourth*: the asymmetry is unreasonable in terms of its effects on MTN:

131.1 The impact on MTN of paying excess termination fees to Cell C and Telkom mobile is contained in Table 1 and Table 2 below. These estimates are calculated on the basis of a "no growth scenario", whereby last year's traffic is used for each of the three years' traffic forecast, and a growth scenario, whereby last year's traffic figures are grown at the current year on year growth rate for the next three years.

*Table 1: MTN excess termination payments to Cell C as a result of the 2014 Regulations*

|              | NO GROWTH SCENARIO | GROWTH SCENARIO |
|--------------|--------------------|-----------------|
| Mar14-Mar15f | R 226,721,139      | R 280,435,371   |

|                               |                      |                        |
|-------------------------------|----------------------|------------------------|
| Mar15-Mar16f                  | R 255,061,281        | R 390,234,883          |
| Mar16-Mar17f                  | R 283,401,424        | R 536,320,446          |
| <b>Total 2014 Regulations</b> | <b>R 765,183,844</b> | <b>R 1,206,990,700</b> |

*Table 2: MTN excess termination payments to Telkom Mobile as a result of the 2014 Regulations*

|                               | NO GROWTH SCENARIO  | GROWTH SCENARIO     |
|-------------------------------|---------------------|---------------------|
| Mar14-Mar15f                  | R 13,098,258        | R 16,201,467        |
| Mar15-Mar16f                  | R 14,735,541        | R 22,544,864        |
| Mar16-Mar17f                  | R 16,372,823        | R 30,984,600        |
| <b>Total 2014 Regulations</b> | <b>R 44,206,622</b> | <b>R 69,730,931</b> |

131.2 The financial impact of the asymmetry does not stop at the significant excess payments to Cell C and Telkom Mobile by MTN. The overall excess payment to Cell C and Telkom Mobile is estimated to be about three times that shown in Tables 1 and 2 above, once other players' contributions are taken into account. As I shall indicate below, the use of this "competitive subsidy," for which there is no principled basis in law or in fact, by Cell C and Telkom Mobile to fund retail price cuts or market share gains in the retail mobile market will substantially impact MTN's market share and revenues, creating additional financial harm for MTN.



132 *Fifth*, Appendix A to the 2014 Regulations provides that the asymmetries in Market 2 are very small and will remain constant. In contrast, the asymmetrical rates in Market 1 are not only higher than in Market 2 but are also variable. ICASA has offered no justifiable basis for the different attitude it has adopted towards asymmetry in Market 1 and in Market 2.

133 *Sixth*, the asymmetry is unreasonable given the growth that Cell C has experienced in recent years:

133.1 Cell C reports that it is currently adding 1 million subscribers a month. Its CEO has boasted of a 33% subscriber growth over the last 18 months: "We have grown our base by 33% to 12.3 million customers in just 18 months," Knott-Craig told delegates at the [MyBroadband 2013] conference" (Cell C subscriber growth soars, BusinessTech October 2013, <http://businesstech.co.za/news/mobile/47428/cell-c-subscriber-growth-soars/>, a copy of which is attached marked "ZB 17").

133.2 This substantial and profitable growth has been taking place in a 4c asymmetry environment.

133.3 In such circumstances increasing Cell C's asymmetry by 500% to 24c/min on 1 March 2014, and providing it with an estimated R2-3bn regulatory subsidy over the next three years would represent a substantial competitive leg-up to an already fast-growing competitor. This subsidy could also be used to pay dividends, repay loans and build a distribution network. This is unreasonable.

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Summation

134 I submit that the 2014 Regulations (alternatively ICASA's decision to make the 2014 Regulations) should therefore be reviewed and set aside on the grounds that:

134.1 relevant considerations were not taken into account and irrelevant considerations were taken into account (as contemplated by section 6(2)(e)(iii) of PAJA);

134.2 they are not rationally related to the purpose of the Regulations, the information before ICASA or the reasons given by ICASA (as contemplated by section 6(2)(f)(ii) of PAJA);

134.3 they are arbitrary (as contemplated by section 6(2)(e)(vi) of PAJA);

134.4 they are unreasonable (as contemplated by section 6(2)(h) of PAJA).

135 If the 2014 Regulations or ICASA's decision to make the 2014 Regulations do not amount to administrative action in terms of the PAJA, then the 2014 Regulations should be reviewed and set aside on the basis that they contravene the constitutional principle of legality.

**Conclusion**

136 For all the reasons set out above, I submit that the following provisions of the 2014 Regulations should be reviewed and set aside:

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136.1 Regulations 3(a), 4, 5, 6, 7(1), 7(2), 7(3)(a), 7(4)(a)(i), 7(4)(b), 8 and 9 of the 2014 Call Termination Regulations;

136.2 Paragraphs 1 and 2 of Appendix A to the 2014 Call Termination Regulations.

137 I am advised that MTN will be entitled to supplement these review grounds once it has been furnished with the record under Rule 53.

### **INTERIM RELIEF**

138 Thus far I have addressed the basis for the relief sought in Part B of the notice of motion. Against that background, I turn now to address the interim relief sought in Part A.


#### ***Prima facie right***

139 I have set out above the grounds on which MTN contends that the 2014 Regulations are irregular and should be set aside.

140 In the light of what is set out above, I submit that MTN has established a clear right, alternatively a prima facie right, to have the 2014 Regulations reviewed and set aside.

#### ***Irreparable harm***

141 MTN will suffer irreparable harm if interim relief is not granted and if the review is in due course successful. I say so for the reasons that follow.



Call termination rates to be charged by MTN

142 If interim relief is not granted, MTN will be required to charge the termination rates in the 2014 Regulations for terminating calls on its network with effect from 1 March 2014. The 2014 Regulations will reduce the MTN Termination Rates from R0.40 to R0.20 overnight.

143 At current traffic levels (i.e. January 2014), this represents an aggregate revenue loss of 53 Rand every second that the 2014 Regulations are implemented.

144 This means that for every day of implementation of the 2014 Regulations, MTN will lose R4.6 million in interconnection revenues.

145 It follows that if the review process were to last (say) for six months, the MTN revenue lost as a result of the 2014 Regulations would amount to R857.6 million

146 These calculations are summarised in the table below:

| MTN interconnection revenue lost |              |
|----------------------------------|--------------|
| R53                              | per second   |
| R3,202                           | per minute   |
| R192,112                         | per hour     |
| R4,610,689                       | per day      |
| R142,931,363                     | per month    |
| R857,588,175                     | per 6 months |




Asymmetric call termination rates to be charged by Cell C and Telkom Mobile

147 If interim relief is not granted, MTN will be required to pay the asymmetric rates in the 2014 Regulations to Cell C and Telkom Mobile when it terminates calls on their networks. The 2014 Regulations will increase the current level of asymmetry from 4c/min to 24c/min with effect from 1 March 2014. That amounts to an overnight increase of 500%.

148 At current traffic levels (i.e. January 2014), the asymmetry represents a competitive subsidy from MTN to Cell C and Telkom Mobile respectively of R7 and R0.5 every second:

148.1 This means that, for each day of implementation of the 2014 Regulations, MTN will pay Cell C R664 000 and will pay Telkom Mobile R45 000 in excess of the (purportedly) efficiently-incurred, cost-oriented rate determined by ICASA for 2014.

148.2 It follows that, if the review process were to last (say) for six months, the MTN excess payments to Cell C and Telkom will amount to R118 million and R8m respectively. Assuming that MTN represents about a third of the total incoming traffic into these two operators, the total cash flow generated through asymmetry payments during a six-month review process would amount to approximately R350 million for Cell C and R25 million for Telkom Mobile.

148.3 These calculations are summarised in the table below:



| MTN asymmetric payments to mobile competitors: |                          |
|--|--------------------------|
| To Cell C                                      | To Telkom Mobile         |
| R 7 per second                                 | R 0.5 per second         |
| R 440 per minute                               | R 31 per minute          |
| R 26,409 per hour                              | R 1,887 per hour         |
| R 633,820 per day                              | R 45,277 per day         |
| R 19,648,428 per month                         | R 1,403,572 per month    |
| R 117,890,568 per 6 months                     | R 8,421,434 per 6 months |

149 In effect, this will amount to the payment of an "asymmetry subsidy" by MTN to Cell C (and Telkom Mobile) during the period before the review is determined. Whilst I take issue with it, ICASA has determined that the cost-oriented rate for 2014 should be 20c. However, the asymmetric rate is 44c. Unless 44c is also cost-oriented (which ICASA has provided no evidence for), then each minute terminated on Cell C at 44c includes a 24c profit margin which MTN has no choice but to pay. This profit margin can then be re-invested by Cell C to pay its debt, to invest in its network or to subsidise retail rates. MTN, on the other hand, does not benefit from the same margin when Cell C customers call its network, and is therefore disadvantaged. Put simply, MTN is required to provide a subsidy to its competitor.

150 If interim relief is not granted and if the review ultimately succeeds, the payment of such an asymmetry subsidy to Cell C and Telkom Mobile would have caused irreparable harm to MTN because the market would by then have changed





permanently. Cell C and Telkom Mobile would have used the cash arising from the asymmetry subsidy for retail pricing, brand perception, access to capital markets, incremental network investment and market share gain. The use of the asymmetry cash for market advantage during this period will produce permanent changes to the structure of the market that could never be undone, even if the review were to succeed. I elaborate below upon the reasons for this.

151 The asymmetry cash could be recycled by Cell C and Telkom Mobile to grow their market share in the high-value, post-paid segment, which is typically contracted for 18-24 months. Share gains in this market segment have a disproportionate impact on revenues and profitability. Even if the review application were ultimately to be successful, any post-paid contract gained by recycling the asymmetric subsidy (for example, through higher handset subsidization, higher channel commissions, or asymmetry-funded promotional pricing) would have a material and durable impact on MTN's financial performance as these customers would not be back "in play" for contract renewal for another 12-18 months.

152 ICASA's stated objective with the asymmetry is to reduce retail rates. Both Cell C and Telkom have announced they will use the new asymmetry regime to reduce their retail pricing. In support of this, I attach a bundle of press reports marked "ZB 18". If Cell C and Telkom Mobile were to reduce their retail prices during the period before the review is determined, it would cause a permanent change to the market that would be irreversible even if the review were to



succeed. Only the grant of interim relief could prevent this change to the market structure from occurring before the review is determined.

- 153 MTN may be forced to reflect the substantially higher mobile termination fees that it will pay to Cell C and Telkom Mobile in its own retail prices. This would impact negatively on MTN's brand, even if the review were ultimately to succeed.
- 154 Implementation of the 2014 Regulations may lead to an increase in traffic from certain operators or routes requiring targeted capacity investment on the part of MTN (for example, specific interconnection links or overall voice network capacity). This investment may become stranded if the review were ultimately to succeed.
- 155 The 2014 Regulations will lead to an in-depth review of the MTN business plan, in an attempt to guarantee shareholder returns. Some corrective actions that will be taken during the review process could not be undone even if the review were to succeed. For example, MTN is likely to consider job cuts, reductions in third party channel incentives, sponsoring and corporate responsibility investments, maintenance contracts, etc.

### ***Balance of convenience***

- 156 If interim relief were to be refused and if the review were ultimately to succeed, MTN would have suffered the harm referred to above. On the other hand, no harm would be caused if interim relief were to be granted and if the review were ultimately to be unsuccessful, because the interim relief will merely perpetuate



the position that currently exists for a few months longer. On this basis alone, the balance of convenience therefore favours MTN.

158. I submit that the grant of interim relief in the present case will not violate the principle of separation of powers. The grant of interim relief will affect the mobile termination fees that are paid by mobile operators to each other, but will not restrain the performance of any governmental function on the part of the national executive. In any event, I respectfully submit that this is the clearest of cases for the grant of interim relief.

159. in the event that interim relief were to be granted, MTN tenders to take all reasonable steps to co-operate with the respondents in order to expedite the hearing of the review in Part B.

***No other remedy***

160. MTN has no other remedy at its disposal other than to seek interim relief.

***The form of interim relief***

161 The primary relief sought by MTN in Part A is an order suspending the 2014 Regulations pending the final determination of Part B. In the event that suspension were to be ordered, MTN tenders to continue charging the mobile termination rates as provided for in the 2010 Regulations until such time as Part B is finally determined, In the event that Part B were in due course to be dismissed, MTN tenders to repay the amounts by which any mobile termination fees that it was paid after 1 March 2014 exceeded the mobile termination fees that would have been payable under the 2014 Regulations.

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162 In the event that this Honourable Court is not minded to order suspension of the 2014 Regulations, MTN asks in the alternative for an order that, with effect from 1 March 2014 until the date of the final determination of Part B ("the interim period"), mobile termination fees will be paid as follows:

162.1 For the duration of the interim period, MTN, Vodacom, Cell C and Telkom Mobile will continue to charge the wholesale call charge termination rates to a mobile location as specified in the 2010 Regulations in the amounts in which those rates applied immediately before the commencement of the 2014 Regulations on 1 March 2014.

162.2 In the event that Part B were to be dismissed, MTN, Vodacom, Cell C and Telkom Mobile shall forthwith pay to every other party the difference (if any) between the mobile termination fees paid during the interim period and the mobile termination fees that would have been payable during the interim period had such fees been calculated in accordance with the 2014 Regulations.

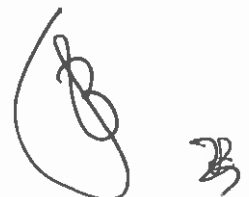
### ***Urgency***

163. The 2014 Regulations will commence on 1 March 2014. For the reasons set out above, it is necessary for interim relief to be granted before that date. This could not be done if the application were brought in the ordinary course. The matter is therefore urgent.



164. The 2014 Regulations were published on 4 February 2014, and MTN launched this application a week later on 12 February 2014. I respectfully submit that the application could not reasonably have been launched any earlier.
165. On 10 February 2014, MTN's attorneys, Webber Wentzel, wrote to ICASA and requested ICASA to defer implementation of the 2014 Regulations pending the final determination of the review that it intended to bring. A copy of Webber Wentzel's letter is attached marked "ZB 19". On 11 February 2014, ICASA's attorneys, Bowman Gilfillan, replied to Webber Wentzel. A copy of their letter is attached marked "ZB 20". As appears therefrom, Bowman Gilfillan advised that they were currently taking instructions from their client and consulting with counsel and that they would respond to Webber Wentzel's letter by close of business on Thursday, 13 February 2014. Webber Wentzel replied on 12 February 2014. A copy of that letter is annexed marked "ZB 21". As appears therefrom, Webber Wentzel indicated that MTN was proceeding with its application without delay, particularly in circumstances where it was abundantly clear that ICASA had already, communicated to Parliament and to the world at large in the media, that it would be opposing the relief sought by MTN. In this regard I attach marked "ZB 22" a piece written by Bekezela Phakathi, Political Correspondent and which was published in the Business Day on 12 February 2014, under the headline "Legal Battle Looms over cellphone fees". Part of the piece reads as follows:

*"The Regulator confirmed in Parliament yesterday that it had received a letter from MTN's lawyers stating that the 'offending*

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*provisions' contained in the Call Termination Regulations must be removed as a matter of "urgency".*

*Nomvuyiso Batyi, a councillor at Icasa who deals with markets and competition, said the Regulator had instructed lawyers to write back to MTN and make it clear the provisions would not be removed.*

*Ms Batyi said Icasa expected Vodacom to follow MTN's decision to challenge the regulations." (my emphasis).*

### **Conclusion**

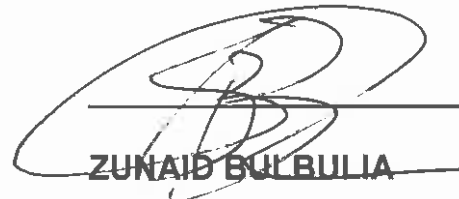
166. I respectfully submit that MTN has made out a proper case for interim relief pending the final determination of Part B.

### **PRAYER**

167. For the reasons set out above, MTN:

167.1. prays for the relief set out in Part A of the Notice of Motion;

167.2. pending supplementation of these papers in accordance with Rule 53(4), prays for the relief set out in Part B of the Notice of Motion.

  
ZUNAID BULBULIA




I hereby certify that the deponent has acknowledged that he:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on his conscience.

THUS signed and sworn to before me, at ROODEPOORT  
on 12 FEBRUARY 2014, the 2014 Regulations contained in Government  
Notice No. R1258 of 21 July 1972 (as amended), having been fully complied with.

**Elismé Taylor**

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**COMMISSIONER OF  
OATHS**



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**GENERAL NOTICE**


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**NOTICE 1015 OF 2010****INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA****"CALL TERMINATION REGULATIONS"  
PURSUANT TO SECTION 67(4) OF THE ELECTRONIC  
COMMUNICATIONS ACT NO. 36 OF 2005**

I, Stephen Mncube, Chairperson of the Independent Communications Authority of South Africa hereby publish the regulations set out in the Schedule in terms of section 4 read with section 67(4) of the Electronic Communications Act No. 36 of 2005.



Dr Stephen Mncube  
Chairperson

  
ZB



**SCHEDULE****"CALL TERMINATION REGULATIONS"  
PURSUANT TO SECTION 67(4) OF THE ELECTRONIC  
COMMUNICATIONS ACT NO. 36 OF 2005****1. DEFINITIONS**

In these Regulations, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act or the ICASA Act has the meaning so assigned, and the following words and expressions shall have the meaning set out below:

**"ON"** means a geographic area code as specified in Regulation 6 of the Numbering Plan Regulations;

**"Authority"** means the Independent Communications Authority of South Africa;

**"the Act"** means the Electronic Communications Act, 2005 (Act No. 36 of 2005);

**"ECNS"** means an electronic communications network service as defined in the Act;

**"ECS"** means an electronic communications service as defined in the Act;

**"Fixed voice call termination service"** means a wholesale voice call termination service provided by an ECNS or ECS licensee to a fixed location, and includes such a service provided by a licensee providing call termination using fixed wireless services;

**"ICASA Act"** means the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000);

**"Mobile voice call termination service"** means a wholesale call termination service provided by an ECNS or ECS licensee to mobile subscriber equipment enabled by wireless technology;

**"Reference Interconnection Offer" or "RIO"** means a document, approved by the Authority, setting out the standard terms and conditions for interconnection agreements;

**"Retail service"** means a service offered by an ECS licensee to end-users;

**"SMP"** means significant market power as defined in section 67(5) of the Act;



**"Wholesale service"** means a service that an ECS or ECNS licensee offers other ECS or ECNS licensees.

## **2. PURPOSE OF REGULATIONS**

The purpose of these Regulations is to: -

- (a) Define and identify the wholesale call termination markets that exist within the borders of the Republic of South Africa;
- (b) Set out the methodology used to determine the effectiveness of competition in such markets;
- (c) Declare licensees that have SMP;
- (d) Set out the pro-competitive measures the Authority imposes to remedy market failure in the relevant markets found to have ineffective competition;
- (e) Set out the schedule for periodic review of the relevant markets and the effectiveness of competition in such markets.

## **3. MARKET DEFINITION**

- (1) The markets in which the Authority intends to impose pro-competitive measures, if such markets are found to have ineffective competition are the markets for mobile and fixed wholesale call termination services in the Republic.
- (2) These markets are categorised according to the type of service provided to the end-user and are defined as follows:
  - (a) Market 1: The market for wholesale voice call termination services to a mobile location on the network of each licensee who offers such a service within the Republic.
  - (b) Market 2: The market for wholesale voice call termination services to a fixed location on the network of each licensee who offers such a service within the Republic, consisting of:
    - i. The market segment for wholesale voice call termination to a fixed location within an 0N geographic area code; and
    - ii. The market segment for wholesale voice call termination to a fixed location between 0N geographic area codes.



#### **4. METHODOLOGY**

In determining the effectiveness of competition in the wholesale voice call termination markets, the Authority has applied the following methodology:

- (a) the identification of relevant markets and their definition according to the principles of the Hypothetical Monopolist Test, taking into account the non-transitory (structural, legal, or regulatory) entry barriers to the relevant markets and the dynamic character and functioning of the relevant markets;
- (b) the assessment of licensees' market shares in the relevant markets; and
- (c) the assessment on a forward-looking basis of the level of competition and market power in the relevant markets.

#### **5. EFFECTIVENESS OF COMPETITION**

Pursuant to regulation 4, the Authority has determined that competition in the wholesale voice call termination markets, as defined in regulation 3, is ineffective.

#### **6. SMP DETERMINATION**

The Authority determines that every licensee that offers wholesale voice call termination services has SMP in its own market.

#### **7. PRO-COMPETITIVE TERMS AND CONDITIONS**

- (1) The Authority has identified the following market failures in the respective wholesale voice call termination markets:
  - (a) a lack of the provision of access
  - (b) the potential for discrimination between licensees offering similar services
  - (c) a lack of transparency
  - (d) inefficient pricing
- (2) All licensees must comply with the following pro-competitive terms and conditions to overcome the market failures identified in regulation 7(1):



- (a) Compliance with the provisions of the Interconnection Regulations (Government Gazette No. 33101 of 2010)
  - (b) Compliance with the Compliance Manual Regulations to be prescribed by the Authority.
  - (c) Charge fair and reasonable prices for wholesale voice call termination consistent with Appendix B
- (3) The Authority has determined that additional pro-competitive terms and conditions are necessary to correct the market failures identified in regulation 7(1), which are to be imposed on the following licensees:
- (a) Licensees that have historically benefitted from the allocation of more efficient lower band spectrum.;
  - (b) Licensees that benefit from economies of scale and scope in maintaining a share of total minutes terminated in the respective markets of greater than 25 per cent as of June 2009.
- (4) The Authority determines that the following licensees have these characteristics:
- (a) Market 1:
    - i. MTN
    - ii. Vodacom
  - (b) Market 2:
    - i. Telkom
- (5) All licensees referred in regulation 7(4) of these regulations must comply with the following additional pro-competitive terms and conditions
- (a) Publication of a Reference Interconnection Offer (RIO)
    - i. Licensees identified in regulation 7(4) must submit a RIO to the Authority for approval within forty five (45) days of promulgation of these Regulations.
    - ii. The RIO must comply with the requirements set out in Appendix A.
    - iii. The Authority will assess a RIO submitted by a licensee within thirty (30) days of its submission.
    - iv. Where the Authority determines that a RIO submitted by a licensee is not consistent with these regulations, the Authority will direct the licensee to amend the relevant terms

  
B

and conditions of the RIO within a period determined by the Authority which period must not exceed thirty (30) days.

- v. If a licensee receives no written communication from the Authority regarding the assessment of its RIO within the thirty (30) day period stipulated in regulation 7(5)(a)(v), the RIO is deemed to be approved.
- vi. The RIO will become effective upon approval by the Authority.
- vii. Provided that all requirements in the RIO are met by both an interconnection seeker and provider, a request for interconnection based on the RIO must be concluded within fifteen (15) days of such a request for interconnection unless otherwise agreed between the licensees.
- viii. A licensee identified in Regulation 7(4) must publish the approved version of its RIO on its website within five (5) days of receiving notice of approval from the Authority.

**(b) Price Control: Cost oriented pricing**

- i. For the period 01 March 2011 to 01 March 2014, any licensee identified in Regulation 7(4)(a) must charge the wholesale voice call termination rates to a mobile location as specified in Table 1:

**Table 1: Wholesale voice call termination rates to a mobile location (Market 1)**

|           | Peak   | Off-peak |
|-----------|--------|----------|
| 01-Mar-11 | R 0.73 | R 0.65   |
| 01-Mar-12 | R 0.56 | R 0.52   |
| 01-Mar-13 | R 0.40 | R 0.40   |

- ii. For the period 01 March 2011 to 01 March 2014, any licensee identified in Regulation 7(4)(b) must charge the wholesale voice call termination rates to a fixed location as specified in Table 2:

**Table 2: Wholesale voice call termination rates to a fixed location (Market 2)**

|           | Within ON area code |          | Between ON area code |          |
|-----------|---------------------|----------|----------------------|----------|
|           | Peak                | Off-peak | Peak                 | Off-peak |
| 01-Mar-11 | R 0.20              | R 0.12   | R 0.28               | R 0.19   |
| 01-Mar-12 | R 0.15              | R 0.12   | R 0.25               | R 0.19   |
| 01-Mar-13 | R 0.12              | R 0.12   | R 0.19               | R 0.19   |



(c) Accounting Separation and Cost Accounting

- i. Licensees identified in regulation 7(4) must submit regulatory financial reports in line with the format prescribed in the Accounting Separation and Cost Accounting regulations to be prescribed by the Authority.

**8. SCHEDULE FOR REVIEW OF MARKETS**

The Authority will review the wholesale voice call termination markets to which these regulations apply, as well as the effectiveness of competition and the application of pro-competitive measures in those markets, after a minimum period of three (3) years from the publication of these regulations.

**9. CONTRAVENTIONS AND PENALTIES**

- (1) A licensee which fails to comply with regulation 7(2)(c) is liable to a fine of Two Hundred Thousand Rand (R 200 000.00);
- (2) A licensee which fails to comply with regulation 7(5)(a) is liable to a fine of up to Five Hundred Thousand Rand (R 500 000.000);
- (3) A licensee which fails to comply with regulation 7(5)(b) is liable to a fine of up to Five Hundred Thousand Rand (R 500 000.00);
- (4) A licensee which contravenes all regulations not specified in regulations 9(1) and (2) is liable to a fine of not more than Two Hundred Thousand Rand (R 200 000.00).

**10. SHORT TITLE AND COMMENCEMENT**

These regulations are called the "Call Termination Regulations, 2010/11" and will become effective upon the date of publication.



## **Appendix A: Minimum content of a Reference Interconnection Offer**

The RIO that must be submitted to the Authority by the licensees listed in Regulation 7(4) must, among other things, include the following:

### **1.1. General Legal Principles**

- Definitions of terms and abbreviations
- Requirements concerning the exchange and use of information for the purpose of interconnection; and
- Data exchange formats.

### **1.2. Initiating Negotiations and Proposing Amendments**

- Procedure for initiating negotiations as well as that for amending interconnection agreements, including:
  - how a request for interconnection is to be made;
  - to whom a request for interconnection is to be sent; and
  - the information that needs to be included in the application.

### **1.3. Description of Interconnection Services to be provided**

- List of interconnection services offered;
- Full description of each interconnection service; and
- Conditions governing access to services.

### **1.4. Schedule of Charges for Interconnection Services**

- Commercial and financial matters, including billing and collection procedures, and payment terms and conditions;
- The full charge for each interconnection service. Where relevant charges should:
  - be broken down into or built up from the charges for the network components;
  - include an indication of any surcharges;
  - include an indication of charging unit/s (e.g. per second);
- Mechanisms for the review of charges; and
- Billing services for third parties, where relevant (e.g. if operator is billing on behalf of resellers, other ECS or other ECNS).



**1.5. Technical Characteristics**

- Comprehensive technical description of the interconnect interface(s), including the signalling protocol(s) used;
- Full details of the availability and location of points of interconnection;
- Description of the physical arrangements for interconnection;
- Description of traffic routing arrangements;
- Details regarding access to numbers by the parties
- Requirements to ensure network security or integrity;
- The quality availability, security, efficiency, and synchronization of the services provided.

**1.6. Arrangements for the Establishment of Interconnection**

- Conditions governing service provision;
- Traffic forecasting requirements and arrangements;
- Arrangements for testing the operation of interfaces and the interoperability of services;
- Fault management procedures (recording and clearing); and
- Conditions governing bank guarantees.

**1.7. Other Legal and Procedural Issues**

- Provisions on procedures for review, termination, and amendment of interconnection agreements;
- Limitation of liability and indemnity between licensees;
- Penalty clauses; and
- Dispute resolution arrangements and procedures, including the right of either party to request the Authority to intervene to resolve a dispute.



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## **Appendix B: APPLICATION OF THE FAIR AND REASONABLE OBLIGATION**

### **1. PRINCIPLES OF IMPLEMENTATION OF FAIR AND REASONABLE OBLIGATION**

- 1.1. For the purposes of regulation 7(2)(c), "fair and reasonable" prices are rates that are equivalent to the cost-oriented rates imposed on the licensees identified in Regulation 7(5)(b).
- 1.2. Licensees must charge the following rates:
  - 1.2.1. Reciprocal rates with the rate set for MTN and Vodacom if these licensees are in Market 1;
  - 1.2.2. Reciprocal rates with the rate set for Telkom if these licensees are in Market 2.
- 1.3. Licensees not listed in Regulation 7(4) may charge higher termination rates based on the following factors:
  - 1.3.1. Spectrum allocation. A licensee must justify why it is adversely affected by current spectrum allocation.
  - 1.3.2. Economies of scale and scope based on the share of total minutes terminated in the relevant market. A licensee qualifies for an asymmetric rate if it has less than 25 per cent of total terminated minutes in the relevant market as of June 2009.
- 1.4. A licensee may qualify for an asymmetric rate if either or both factors are applicable.

### **2. LIMITATIONS TO ASYMMETRIC RATE A LICENSEE MAY CHARGE**

A licensee who qualifies for an asymmetric rate under paragraph 1.3 of this Annexure may charge a maximum percentage above the cost-oriented rate set in regulation 7(5)(b) according to the following table:

|           | Maximum percentage above rate set for Identified licensees |
|-----------|--|
| Current   | -  |
| 01-Mar-11 | 20%  |
| 01-Mar-12 | 15%  |
| 01-Mar-13 | 10%  |

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ICASA Wholesale Call Termination Market Review for the period 2010-2013

## **ICASA Wholesale Call Termination Market Review for the period 2010-2013**

### **Explanatory Note for the draft Call Termination Regulations**

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## ICASA Wholesale Call Termination Market Review for the period 2010-2013

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**List of Abbreviations**

|           |   |
|-----------|---|
| Authority | The Independent Communications Authority of South Africa  |
| ECA       | Electronic Communications Act No. 36 of 2005  |
| ECNS      | Electronic Communications Network Service   |
| ECS       | Electronic Communications Service   |
| RIO       | Reference Interconnection Offer   |
| VOIP      | Voice Over Internet Protocol  |
| SS7       | Signalling Protocol 7 as defined by ITU Recommendations   |
| SIP       | Session Initiation Protocol as defined by the ITU or any other recognised standards body where no ITU standard is in place.   |
| TDM       | Time Division Multiplex as defined by ITU Recommendations or any other recognised standards body where no ITU standard is in place                                    |
| ON        | Geographic area code as specified in Regulation 6 of the Numbering Plan Regulations in terms of the Telecommunications Act, 1996 (GG No. 28839, 15 May 2006: page: 9) |
| ONN       | The three-digit geographic area code that imposes specific locational significance to a number.   |

## **1. Executive Summary**

### **1.1 Definition of the relevant market**

1. The Authority determines that wholesale voice call termination services may be defined as existing within two markets:
  - a. **Market 1:** The market for wholesale voice call termination services to a mobile location on the network of each licensee who offers such a service within the Republic of South Africa.
  - b. **Market 2:** The market for wholesale voice call termination services to a fixed location on the network of each licensee who offers such a service within the Republic of South Africa, consisting of:
    - i. The market segment for wholesale voice call termination to a fixed location within an ON geographic area code; and
    - ii. The market segment for wholesale voice call termination to a fixed location between ON geographic area codes.

### **1.2 Effectiveness of competition in the relevant markets**

1. The Authority put forward its provisional conclusion regarding the evaluation of the effectiveness of competition in the relevant markets in Section 2.4 of the Explanatory Note to the draft Call Termination Regulations (GG 33121, page 67).<sup>1</sup>
2. No evidence has been submitted to persuade the Authority that competition in either market for the provision of wholesale voice call termination services is effective.

### **1.3 Pro-competitive terms and conditions**

1. The Authority identified the following market failures within the wholesale call termination markets:
  - a. a lack of the provision of access
  - b. the potential for discrimination between licensees offering similar services
  - c. a lack of transparency
  - d. inefficient pricing
2. The Authority has identified the following pro-competitive terms and conditions to be imposed on all licensees to rectify the above market failures:
  - a. Compliance with the provisions of the Interconnection Regulations (Government Gazette No. 33101 of 2010) (Regulation 7(2))
  - b. Compliance with the Compliance Manual Regulations to be prescribed by the Authority (Regulation 7(2)),
  - c. Charge fair and reasonable prices for wholesale voice call termination consistent with Appendix B ((Regulation 7(2))).
3. Additional pro-competitive terms and conditions to rectify the above market failures are imposed on those licensees with the following characteristics:
  - a. Licensees that have historically benefitted from the allocation of more efficient lower band spectrum by the Authority;
  - b. Licensees that benefit from economies of scale and scope in maintaining a share of total minutes terminated in the respective markets of greater than 25 per cent as of June 2009.

<sup>1</sup> The draft Call Termination Regulations and the Explanatory Note thereto, as released in GG 33121 on 16 April 2010, are referred to as "GG33121" throughout the remainder of this document.



4. The Authority determines that the following licensees are to comply with the additional pro-competitive terms and conditions:
  - a. Market 1 (Regulation 7(4)(a)):
    - i. Vodacom
    - ii. MTN
  - b. Market 2 (Regulation 7(4)(b)):
    - i. Telkom
5. The additional pro-competitive terms and conditions to rectify the identified market failures are:
  - a. Obligation to develop a reference interconnection offer to facilitate enhanced access and transparency and therefore support Object 2(b) of the ECA which is to facilitate interoperable networks (Regulation 7(5)(a)).
  - b. Obligation to charge cost-oriented prices to overcome the market failure of inefficient pricing (Regulation 7(5)(b)):
    - i. Market 1:

**Table 1: Wholesale voice call termination rates to a mobile location (Market 1)**

|               | Peak   | % adjustment | Off-peak | % adjustment |
|---------------|--------|--------------|----------|--------------|
| Current rates | R 0.89 |              | R 0.77   |              |
| 01-Mar-11     | R 0.73 | -18%         | R 0.65   | -16%         |
| 01-Mar-12     | R 0.56 | -23%         | R 0.52   | -20%         |
| 01-Mar-13     | R 0.40 | -29%         | R 0.40   | -23%         |

**II. Market 2:****Table 2: Wholesale voice call termination rates to a fixed location (Market 2)**

|           | Within ON geographic area code |       |          |       | Between ON geographic area code |       |          |       |
|-----------|--------------------------------|-------|----------|-------|---------------------------------|-------|----------|-------|
|           | Peak                           | % adj | Off-peak | % adj | Peak                            | % adj | Off-peak | % adj |
| Current   | R 0.23                         |       | R 0.12   |       | R 0.33                          |       | R 0.19   |       |
| 01-Mar-11 | R 0.20                         | -13%  | R 0.12   | 0%    | R 0.28                          | -15%  | R 0.19   | 0%    |
| 01-Mar-12 | R 0.15                         | -25%  | R 0.12   | 0%    | R 0.25                          | -11%  | R 0.19   | 0%    |
| 01-Mar-13 | R 0.12                         | -20%  | R 0.12   | 0%    | R 0.19                          | -24%  | R 0.19   | 0%    |

- c. Obligation to comply with Accounting separation and Cost Accounting regulations to be prescribed by the Authority (Regulation 7(5)(c)).
6. All other licensees may charge an asymmetric (higher) termination rate subject to certain conditions. Licensees that do satisfy the set criteria cumulatively may charge an asymmetric rate subject to the table below (see Appendix B):

**Table 3: Maximum asymmetric (higher) termination rate a qualifying licensee may charge**

|           | Maximum percentage above rate set for licensees specified in Regulation 7(4) |
|-----------|--|
| Current   | -  |
| 01-Mar-11 | 20%  |
| 01-Mar-12 | 15%  |
| 01-Mar-13 | 10%  |

#### **1.4 Conclusions**

The Authority expects the imposition of pro-competitive terms and conditions on Markets 1 and 2 to achieve the following:

- a. A more efficient and effective access regime;
- b. A more dynamic retail pricing environment;
- c. Continued access and investment in electronic communications networks in South Africa.

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## 2. Amendments to the draft Call Termination Regulations as released in GG 33121

### 2.1 Introduction

1. On review of the written, oral and further submissions in respect of GG 33121, the Authority identified the following concerns that required attention:
  - The definition of "fixed call termination"
  - The definition of the relevant market for wholesale call termination
  - Within and Between ON points of interconnection and retail tariffs
  - Evaluation of the effectiveness of competition
  - Identification of proportionate pro-competitive terms and conditions
  - Design of the proposed price control
  - Reference Interconnect Offer
  - Convergence
2. This section provides the Authority's rationale for any amendments made to the draft Call Termination Regulations as released in GG 33121.

### 2.2 Definition of the market for wholesale voice call termination in South Africa

This section reviews the following:

- The definition of fixed call termination
- The definition of the market for termination:
  - to a mobile location
  - to a fixed location

#### 2.2.1 The definition of fixed call termination service

1. The Authority put forward the following definition for fixed call termination:
 

*"Fixed call termination" means a wholesale call termination service provided by an electronic communications network services or electronic communications services licensee to a fixed location, and includes licensees providing call termination using VoIP to a fixed location and fixed wireless services (Page 5, GG 33121)*
2. A number of licensees raised concerns regarding the inclusion of VoIP services in the definition for "fixed call termination," including Smile Telecoms, Telkom, ISPA and Vox Telecoms.
3. The queries revolved around the inclusion of a specific technology (VoIP) in the definition of a service when that technology could be used to provide both fixed location and mobile location services.
4. The concern regarding reference to a specific technology is noted.
5. The Authority also notes Telkom's query regarding the possible differentiation between fixed (wireline) location services and fixed (wireless/nomadic) services.
6. In practice, the Authority determines that the differentiating feature is whether it is possible for the end-user to maintain an active session, i.e. a voice call during a change in location.
7. Taking the above into account, the Authority amends the definition of fixed call termination service to the following:

*"Fixed voice call termination" means a wholesale voice call termination service provided by an electronic communications network services or electronic communications services licensee to a fixed location, and includes licensees providing termination using fixed wireless services.*

### 2.2.2 Definition of the market for wholesale voice call termination

1. Regulation 3 of the draft Call Termination regulations defined the market as follows:

"separate wholesale call termination markets on each electronic communications network and electronic communications service licensee in South Africa" (Regulation 3, page 6, GG 33121).
2. The Authority gave more detail on the interpretation of this definition in the explanatory note accompanying the regulations:

"For the avoidance of doubt, the Authority notes that all licensees that provide wholesale call termination services are included in this market definition. This includes licensees that provide Voice over Internet Protocol (VoIP) services as well as Class ECNS/ECS licensees" (page 48, GG 33121).
3. Stakeholders raised a number of queries regarding the accuracy of the definition given the manner in which call termination services are provided.
4. These queries included concerns as to whether:
  - a. termination to a fixed location is in the same market as termination to a mobile location (Telkom);
  - b. other termination services, such as SMS and MMS services are, included in the definition of the market (MTN);
  - c. the market for termination to a fixed location is too broad, owing to the potential for four wholesale markets existing within the proposed market definition (see pages 5-24 of Neotel's written submission);
  - d. the possible existence of different termination rates to different services, particularly Value Added Services (point 46 of ISPA's written submission).
5. The Authority responds to these queries below.





### **2.2.3 The definition of the market for wholesale voice termination to a fixed location**

1. The Authority notes that, in practice, interconnection between two licensees providing termination to a fixed location is characterised by the opportunity for both near-end and far-end handover, whilst interconnection between any licensee and a licensee providing wholesale voice call termination to a mobile location is characterised by near-end handover.
2. The ability to choose between near-end and far-end handover in the provision of wholesale voice call termination services to a fixed location and the importance of this differentiation in fostering infrastructure competition therefore leads to the need for a review of the initial definition as proposed in GG 33121.
3. The product nature of each market segment is the same in that a termination service to a fixed location is provided.
4. However, the geographic boundaries of each segment are different. The geographic boundary for the market for Between Billing Zone (BBZ) wholesale voice call termination to a fixed location is that geographic area outside the geographic area/province code from which a voice call is originated but within the boundaries of the Republic of South Africa, i.e. between the ON geographic area/province codes of the numbering plan.
5. The geographic boundary for the market for Within Billing Zone (WBZ) wholesale voice call termination to a fixed location is that of the defined boundary within the ON geographic area/province codes of the numbering plan.
6. The Authority determines that the definition of the market for wholesale voice call termination to a fixed location consists of two market segments as defined below:
  - a. The market segment for wholesale voice call termination to a fixed location within the ON geographic area code of the numbering plan; and
  - b. The market segment for wholesale voice call termination to a fixed location between ON geographic area codes of the numbering plan.

### **2.2.4 Conclusion on the definition of the market**

1. The Authority determines that the product and geographic definition of the market for wholesale voice call termination services is dependent on the characteristics of the service as well as the manner in which the service may be provided.
2. The geographic boundary of the market differs based on cost causation and the ability and choice to apply either near-end and/or far-end handover.
3. Therefore, the Authority determines the following definitions of the market and market segments for the provision of wholesale voice call termination services in South Africa:
  - a. Market 1: The market for wholesale voice call termination services to a mobile location on the network of each licensee which offers such a service within the Republic of South Africa.
  - b. Market 2: The market for wholesale voice call termination services to a fixed location on the network of each licensee which offers such a service within the Republic of South Africa, consisting of:
    - i. The market segment for wholesale voice call termination to a fixed location within the ON geographic area code; and
    - ii. The market segment for wholesale voice call termination to a fixed location between ON geographic area codes.



## 2.3 Evaluation of the effectiveness of competition

1. The Authority put forward its provisional conclusion regarding the evaluation of the effectiveness of competition in the relevant markets in Section 2.4 of GG 33121 (page 67).
2. No evidence has been submitted to persuade the Authority that the market for the provision of wholesale voice call termination services in either market is competitive.

## 2.4 Imposition of pro-competitive terms and conditions

This section outlines the Authority's response to the following matters:

- Imposition of pro-competitive terms and conditions in a proportionate manner
- The design of the price control
- The construction and contents of a Reference Interconnection Offer
- Monitoring reports.

### 2.4.1 Imposition of pro-competitive terms and conditions in a proportionate manner

1. The Authority outlined its approach to the Imposition of pro-competitive terms and conditions to remove any existing market failures, stating that "specific obligations imposed must be based on the nature of the problem identified, and must be proportionate and justified" (page 73 of GG 33121).
2. The Authority stated that the following pro-competitive terms and conditions might to be imposed:
  - a. Pro-competitive terms and conditions to be imposed on all licensees in the wholesale call termination market:
    - i. Access, transparency and non-discrimination obligations: These obligations already form part of the regulatory regime for all licensees under Section 37 of the ECA (Regulation 7 and Section 3.4.3.2 of GG 33121)
    - ii. Obligation to maintain and submit reports to the Authority (Regulation 11 and Section 3.5.2 of GG 33121)
    - iii. An obligation to charge fair and reasonable prices (Regulation 8(2) and page 79 of GG 33121).
  - b. Pro-competitive terms and conditions to be imposed on those licensees with "Established Significant Market Power" (Regulation 6(2) of GG 33121)
    - i. Obligation to publish a reference interconnection offer (Regulation 8 and page 77 of GG 33121)
    - ii. A specific price control obligation (Regulation 9(1) and page 78 of GG 33121),
    - iii. Accounting separation and cost accounting obligation (Regulation 10 and page 83 of GG 33121).
3. The Authority proposed these pro-competitive terms and conditions based on the need to correct the following identified market failures:
  - a. a lack of the provision of access
  - b. the potential for discrimination between licensees offering similar services
  - c. a lack of transparency
  - d. inefficient pricing



4. The Authority notes the concerns raised regarding the use of the terminology "Established Significant Market Power" as well as the request for greater clarity on how compliance with specific remedies is to be linked with overcoming the identified market failures.
5. The Authority has amended its criteria for the classification of licensees for the imposition of pro-competitive terms and conditions according to specific behavioural and structural characteristics of licensees.
6. The Authority determines that additional pro-competitive terms and conditions are to be imposed on those licensees that, from an ex ante approach, have countervailing bargaining power<sup>2</sup>, and therefore maintain the greatest potential to leverage off the identified market failures. The Authority has determined that licensees with the following characteristics are likely to be able to act in such a way:
  - a. Licensees that have historically benefitted from the allocation of more efficient lower band spectrum by the Authority;
  - b. Licensees that benefit from economies of scale and scope in maintaining a share of total minutes terminated in the respective market of greater than 25 per cent as of June 2009 (see Tables 2.3 and 2.4 of GG 33121 on pages 55 and 56 respectively).
7. Vertical integration is not deemed to be a category for qualification for asymmetric regulation because of the non-discrimination requirements of sections 37(6) and 43(7) of the ECA, which refer to interconnection and facilities leasing services.
8. Only those licensees declared to benefit from the above characteristics are to face additional pro-competitive terms and conditions that are necessary to correct the identified market failure.
9. The following licensees are to comply with additional pro-competitive terms and conditions in relation to Market 1:
  - a. **Vodacom:** Vodacom has historically benefitted from the allocation of more efficient lower band spectrum and has maintained a share of total minutes terminated in Market 1 of greater than 25 per cent as of June 2009. These characteristics afford Vodacom sufficient countervailing bargaining power to influence termination rates in other markets.
  - b. **MTN:** MTN has historically benefitted from the allocation of more efficient lower band spectrum and has maintained a share of total minutes terminated in Market 1 of greater than 25 per cent as of June 2009. These characteristics afford MTN sufficient countervailing bargaining power to influence termination rates in other markets.
10. The following licensee is to comply with additional pro-competitive terms and conditions in relation to Market 2:
  - a. **Telkom:** Telkom has benefitted from preferential access to spectrum owing to its historical ownership structure and has maintained a share of total minutes terminated in Market 2 of greater than 25 per cent as of June 2009. These characteristics afford Telkom sufficient countervailing bargaining power to influence termination rates in other markets.

#### 2.4.2 The design of a price control

1. The Authority re-iterates its position that the provision of wholesale voice call termination services, irrespective of location, is a bottleneck service, allowing a licensee

<sup>2</sup> Countervailing bargaining power exists when a particular purchaser (or purchaser group) of a product is sufficiently important to its supplier to influence the price charged for that product.

*"to set the price for call termination above competitive levels"*<sup>3</sup>.

2. The objective of the imposition of a price control for the provision of wholesale voice call termination services remains as stated in GG 33121:

*"The Authority seeks to ensure that prices and margins are reduced to a level that covers the cost of efficiently incurred capital, as would be the case in a competitive market."*<sup>4</sup>

3. The following factors affect the design of a price control to compensate for the lack of effective competition:
- a. Non-discrimination: In upholding the non-discrimination principle of section 37(6) of the ECA as well as Regulation 10 of the Interconnection Regulations (GG 33101),<sup>5</sup> a licensee is to charge wholesale voice call termination rates based on the cost incurred to terminate a voice call on its network **irrespective of whether the source of the traffic stems from a mobile or fixed location.**
  - b. A flat versus peak/off-peak differential for termination rates:
    - i. The Authority put forward its view that wholesale voice call termination should be charged at one rate, irrespective of time (Page 92 of GG 33121).
    - ii. Cell C supported this approach, whilst MTN, Telkom and Vodacom disputed the imposition of a single rate for wholesale voice call termination.
    - iii. The Authority's view is that an efficient network should be dimensioned based on the maximum traffic expected at any given time. Furthermore, in one-on-one meetings with licensees it was acknowledged that the peak/off-peak termination rate structure has little impact on the nature of calling patterns of end-users. End-user calling patterns are dictated by socio-economic and cultural factors. The retail pricing strategies of licensees seek to exploit these characteristics by introducing packages to stimulate increased traffic, for example, over weekends.
    - iv. The Authority maintains its view that wholesale voice call termination services are to be charged at one rate and that flexibility in the management of traffic may be achieved through the pricing of services in the retail market.
    - v. For purposes of call termination, peak calling hours are defined as calling hours from Monday to Friday 07H00 to 20H00.
    - vi. Off peak call hours are defined as all hours other than the peak rate group hours.

#### 2.4.3 The design of a glide-path towards the efficient level for Market 1

1. MTN, Vodacom and Cell C all voiced the following concerns:
- a. Interconnection must be financially and economically feasible as per section 37(3)(a) of the ECA;
  - b. The implementation of the rate cut should be deferred to 1 March 2011;
  - c. The degree of change per year should be smoothed out to reduce substantial shocks to the industry;
  - d. Inflation should be considered when implementing a price control.

<sup>3</sup> Page 57 of the Explanatory Note to the Draft Call Termination Regulations, GG 33121

<sup>4</sup> Page 51 of the Explanatory Note to the Draft Call Termination Regulations, GG 33121

<sup>5</sup> GG 33252, 31 May 2010

2. Furthermore, MTN and Vodacom requested that if the Authority is to maintain its position on a single rate, that the rate be introduced over time to minimise any shocks to existing business models (page 22 and 7 of written submissions respectively).
3. The Authority acknowledges that a change in the wholesale pricing regime from a two-tier to a single-tier termination rate regime may have an impact on the business structure of all licensees, including those involved in independent downstream retail services.
4. Regarding inflation, the Authority expects licensees to compensate for reasonable inflationary pressures through internal efficiency gains. The Authority determines that reasonable inflationary pressures are inflationary pressures within the inflation target band of 3-6 per cent as set by the South African Reserve Bank.
5. The Authority will consider amending the termination rate to be charged in March 2014, should the Consumer Price Index reflect an increase in inflation above the inflation target band.
6. The Authority has determined that it is necessary to minimise the shock of a reduction in termination rates to provide adequate time for licensees and their re-sellers to review their distribution agreements.
7. Therefore the Authority determines the following termination rate glide path applicable to those licensees identified in Regulation 7(5)(b)(i):

**Table 4: Wholesale voice call termination rates to a mobile location (Market 1)**

|               | Peak   | % adjustment | Off-peak | % adjustment |
|---------------|--------|--------------|----------|--------------|
| Current rates | R 0.89 |              | R 0.77   |              |
| 01-Mar-11     | R 0.73 | -18%         | R 0.65   | -16%         |
| 01-Mar-12     | R 0.56 | -23%         | R 0.52   | -20%         |
| 01-Mar-13     | R 0.40 | -29%         | R 0.40   | -23%         |

8. The intention is for the Authority to review the above rates for amendment after 01 March 2014.

#### **2.4.4 The design of a glide-path towards the efficient level for Market 2**

1. The Authority proposed that the cost of termination on Telkom's network should be R 0.10 (Regulation 9(1)(b) of GG 33121).
2. Telkom disputed the proposed R 0.10 rate in its written submission, stating the following: "FTR should be set at ZAR 0.37 and adjusted over time in line with changes to the costs of the access deficit" (page 64 of the Telkom submission to the draft regulations).
3. Telkom proposed this figure based largely on the existence of an access line deficit, in part created by universal service obligations (listed on page 60 of the Telkom submission).
4. The ITU and the European Commission have stated the following regarding the inclusion of access line costs in the derivation of a cost-oriented rate for interconnection:

*"[Access] lines are considered as customer dedicated, therefore, all related expenses should be recovered either by rental, one-off purchase, or other arrangements that would not impact the cost of interconnection on the core network" (ITU, 2003, page 2)<sup>6</sup>*

and

<sup>6</sup> ITU document reference: GR TAL - C 3 - E, [www.itu.int/itudoc/itu-t/tal/cost-od/84386\\_wv9.doc](http://www.itu.int/itudoc/itu-t/tal/cost-od/84386_wv9.doc)

*"since the provision of interconnection does not lead to any increase of costs in the dedicated components of the local loop of the terminating network, the calculation of interconnection charges should not include any component relating to the direct cost of the subscriber-dedicated components of the local loop" (Commission recommendation 98/195/EC, page 73/46).*

5. The World Bank<sup>7</sup> has stated the following regarding the provision of interconnection services:

*"Considering the example of interconnection services, it is important to underscore the following three conclusions:*

- *The provision of interconnection services does not modify the retail sales service, as the latter only concerns sales to final subscribers.*
- *The provision of interconnection services does not modify the access service, as the capacity implemented and its maintenance do not have to be adjusted to bear the flow of this additional traffic.*
- *In contrast, transport services are affected by the traffic resulting from interconnection services.*

*As a result, the cost of access services must be covered by retail service revenues. Unless these services rates are rebalanced, there are risks for anticompetitive practices and cream skimming. In other words, market deregulation imposes a certain cost orientation for dominant operators' tariffs, and, consequently, implies a price restructuring that eliminates the largest existing pricing averaging."*

6. This is consistent with the allocation of costs as specified in volume 3 of the Chart of Accounts and Cost Allocation Manual (GG 23632).

7. The Authority therefore determines the following:

- a. Universal service obligations<sup>8</sup> are not to form part of a determination on termination rates for commercial services. These matters are dealt with through separate regulatory processes.
- b. Access costs are to be borne by the consumer.
- c. Licensees have the freedom to adjust any retail tariffs.

8. Taking into account the revised definition of the market for termination to a fixed location, whilst including an incentive for investment in fixed location infrastructure, the Authority imposes the following termination rates to a fixed location to be levied by those licensees listed in Regulation 7(5)(b)(ii):

**Table 5: Wholesale voice call termination rates to a fixed location (Market 2)**

|                  | Within ON geographic area code |       |               |           | Between ON geographic area code |       |               |       |
|------------------|--------------------------------|-------|---------------|-----------|---------------------------------|-------|---------------|-------|
|                  | Peak                           | % adj | Off-peak      | % adj     | Peak                            | % adj | Off-peak      | % adj |
| <b>Current</b>   | <b>R 0.23</b>                  |       | <b>R 0.12</b> |           | <b>R 0.33</b>                   |       | <b>R 0.19</b> |       |
| <b>01-Mar-11</b> | R 0.20                         | -13%  | R 0.12        | 0%        | R 0.28                          | -15%  | R 0.19        | 0%    |
| <b>01-Mar-12</b> | R 0.15                         | -25%  | R 0.12        | 0%        | R 0.25                          | -11%  | R 0.19        | 0%    |
| <b>01-Mar-13</b> | R 0.12                         | -20%  | <b>R 0.12</b> | <b>0%</b> | R 0.19                          | -24%  | R 0.19        | 0%    |

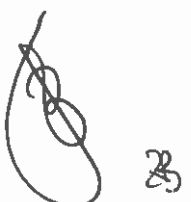
<sup>7</sup> See page 24 of "A Model for calculating Interconnection Costs in Telecommunications" 2004. Available at: [http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2004/03/04/000090341\\_20040304155451/Rendered/PDF/280390.PAPER0Model0for0calculating0costs.pdf](http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2004/03/04/000090341_20040304155451/Rendered/PDF/280390.PAPER0Model0for0calculating0costs.pdf)

<sup>8</sup> Including termination rates to community service telephones

9. The Authority is of the view that the above rates provide for an investment incentive to support further network investment by new entrants as well as provide adequate revenue generation for existing licensees to retain and maintain investments.
10. The intention is for the Authority to review the above rates for amendment after 01 March 2014.

#### **2.4.5 Fair and reasonable rates, symmetry and the case for asymmetry**

1. The objective of regulating specific voice call termination rates is to ensure that these rates are set at an "efficient level" (GG 33121: 69).
2. The Authority indicated its preference for symmetrical prices for similar services in GG 33121 and reiterates its position here.
3. However, the Authority notes international arguments both for and against asymmetry as well as those points raised during the public consultation process.
4. The Authority determines that the application of asymmetric rates for a transitory period will benefit total social welfare by stimulating increased competition in the respective markets, thereby benefiting end-users.
5. However, asymmetric (higher) termination rates may only be justified on certain criteria to ensure that only those licensees that are dedicated to the goal of reducing retail prices through competitive forces qualify for such asymmetry.
6. Therefore the Authority has determined that the following criteria apply when a licensee considers whether it may qualify for an asymmetric rate:
  - a. Spectrum allocation: The allocation of spectrum is a factor controlled by the Regulator, not the licensee. The Authority determines that licensees who are able to quantitatively show a prejudiced impact on cost based on the allocation of spectrum may qualify for an asymmetric (higher) termination rate.
  - b. Economies of scale and scope: The Authority determines that a licensee may choose to apply an asymmetric rate under the following conditions:
    - i. The licensee is an I-ECS licence holder with a share of total minutes terminated in the respective market of less than 25 per cent as of June 2009 (see Tables 2.3 and 2.4 of GG 33121 on pages 55 and 56 respectively);
    - ii. All I-ECS licensees who lease electronic communications facilities are bound by the principle of non-discrimination in Regulation 10(3) of the Interconnection Regulations and Regulation 9(3) of the Electronic Communications Facilities Leasing Regulations.
7. A licensee may qualify for an asymmetric rate if either or both factors are applicable..
8. The Authority determines that it is necessary to limit and reduce the amount of asymmetry a qualifying licensee may charge, to ensure that investment by new entrants is efficient.



9. The Authority therefore imposes the following limits which a qualifying licensee may charge:

**Table 6: Maximum asymmetric (higher) termination rate a qualifying licensee may charge**

|           | Maximum percentage above rate set for licensees specified in Regulation 7(2) |
|-----------|--|
| Current   | -  |
| 01-Mar-11 | 20%  |
| 01-Mar-12 | 15%  |
| 01-Mar-13 | 10%  |

#### 2.4.6 Requirement to develop a reference interconnection offer

1. The Authority stated that those licensees listed in Regulation 6(2) of GG 33121 must develop a reference interconnection offer ("RIO").
2. Vodacom proposed that all licensees be required to develop a RIO (page 22 of Vodacom's written submission).
3. The Authority determines that it is not necessary for all licensees to develop a RIO and only those licensees identified in Regulation 7(5)(a) are required to comply with the submission of a RIO to the Authority for review.
4. Licensees also raised concerns about the maximum time period of 15 days required to complete an interconnection agreement (Regulation 8(7) of GG 33121).
5. The Authority accepts that certain interconnection agreements may require "non-standard" features.
6. However, given a typical circumstance where standard procedures are to be followed, using the same points of interconnect already in use by other licensees, or through a hosting centre, the Authority sees no reason why an interconnection agreement cannot be concluded within 15 days from a technical perspective.
7. Regarding commercial concerns, the Authority expects interconnection providers to be able to conduct any credit vetting procedures within the 15 days.
8. Therefore, the Authority is of the view that the only reasons why an interconnection agreement cannot be concluded within 15 days are the following:
  - a. The interconnection seeker fails to provide relevant information regarding technical requirements;
  - b. The interconnection seeker fails to provide relevant information regarding commercial requirements for surety regarding bank guarantees.
9. Therefore, a delay in completing an interconnection agreement within 15 days may only be a result of delays caused by the interconnection seeker.
10. The Authority will review RIOs submitted to it under Regulation 7(5)(a).
11. The Authority will particularly focus on the following components of a RIO:
  - a. The terms and conditions regarding bank guarantees:
    - i. The role of a bank guarantee is to ensure that an interconnection provider is not prejudiced if an interconnection seeker is unable to pay the due termination revenue at the end of each billing period.
    - ii. Excessively high bank guarantees may represent an implicit refusal to deal in which event an interconnection provider may foreclose entry to a new entrant or interconnection seeker.



- iii. The Authority has concerns regarding the high level of bank guarantees charged historically as well as the terms included in existing interconnection agreements, such as the "unconditional right to increase a bank guarantee".
  - iv. An interconnection agreement is an agreement between two parties that is required to include terms and conditions that not only comply with the obligation to interconnect (section 37(1) of the ECA), but also foster a fair and non-discriminatory access regime.
  - v. The Authority has on several occasions informed licensees of its concerns regarding the inclusion of an "unconditional right to increase a bank guarantee".
  - vi. The Authority determines that bank guarantees, if necessary, must be based on objective and transparent criteria.
  - vii. Furthermore, where a bank guarantee is agreed-upon, each party to an interconnection agreement is to be afforded the right to request and review the level of any guarantee conditions based on good cause shown.
  - viii. **The Authority determines that the upper limit to the value of any bank guarantee in a RIO is the value of three months forecast terminating traffic.**
  - ix. The Authority determines that the above position ensures that no party to any interconnection agreement with any licensee experiences any discrimination.
- b. The terms and conditions regarding minimum traffic/revenue requirements:
- i. The objective role of a minimum traffic guarantee is to ensure that the interconnection provider does not suffer any prejudicial investment cost in terms of the creation of a "stranded asset", i.e. the expenditure incurred in establishing the point of interconnection is not recovered from revenue received from the interconnection seeker.
  - ii. However, excessively high minimum traffic/revenue requirements may also represent implicit market foreclosure as discussed regarding excessively high bank guarantees.
  - iii. If a minimum traffic/revenue requirement is to be included in a RIO, justification for such must be provided.
- c. Signalling protocols:
- i. Traditionally, South African licensees have provided interconnection exclusively on a TDM-basis, requiring any interconnection seeker to convert traffic to and from their network into the requisite standard as set by the interconnection provider, and cover the costs thereof (e.g. conversion to SS7).
  - ii. This practice is fair and reasonable and justified if the interconnection provider uses the same protocols for transport within its network.
  - iii. However, if the interconnection provider manages its internal network traffic through another protocol, such as SIP, then it would be discriminatory for the interconnection provider not to provide the opportunity for an interconnection seeker to interconnect using such a signalling protocol.
- d. Points of interconnection:
- i. It may not be necessary for interconnecting parties to have a direct interconnection link.
  - ii. Licensees should consider the approach of an open connection point where all licensees who seek to interconnect may do so, e.g. through the use of a hosting centre or "interconnection hotel."



- iii. In this scenario, the Authority expects each licensee to provide/pay for its own point of interconnection link, removing the "stranded asset concern", thereby removing the need for any minimum traffic guarantee.

#### 2.4.7 Monitoring Reports

The Authority has reviewed the concerns raised by licensees and has determined that such information is to be included in the Compliance Procedures Manual.

#### 2.5 Within and Between ON geographic area codes, points of interconnection and retail tariffs

1. The Authority is aware that certain licensees charge their customers a set off-net retail fee regardless of the geographic source and destination of an off-net call. This retail pricing practice ignores the cost causation principle in carrying traffic from one location to another.
2. Although the Authority has no intention of specifically regulating retail services at this juncture, the Authority requires all licensees to review the structure of their retail tariffs such that the retail fee charged for off-net calls reflects the characteristics of points of interconnection and the applicable charges for termination between licensees.
3. The Authority is also aware that it may be financially and technically feasible for points of interconnection to take place between Telkom and any other licensee at levels at the ONN level of Telkom's network. Such a point of interconnection was envisaged in the Telkom/Neotel interconnection agreement signed in 2007.
4. The Authority understands that this may not be possible at all geographic locations, but a request for such a point of interconnection may not be refused in those geographic areas where it is possible, as governed by section 37 of the ECA and the Interconnection Regulations (GG 33101).

#### 2.6 Retention rates

1. The Authority is aware of concerns regarding retention rates, particularly ECN Telecommunication's complaint lodged against Telkom at the Competition Commission of South Africa on the 16th of October 2009.
2. The Authority will closely monitor any response by licensees to the introduction of asymmetric termination rates and whether any increase to the retail price of an off-net call occurs.
3. The Authority is also aware of the practice of having specific charges for "call set-up" costs, i.e. a retail fee that is charged independently of usage.
4. This feature of retail pricing has been regulated in other jurisdictions.<sup>9</sup>
5. The Authority will also monitor this feature of retail pricing diligently over the next three years.

<sup>9</sup> <http://www.opta.nl/nl/actueel/alle-publicaties/publicatie/71d=3224>



## **2.7 Convergence**

1. The Authority notes the points raised by stakeholders as well as observable trends in certain jurisdictions tending towards lower and converging mobile and fixed termination rates and will monitor these trends during the review period.
2. However, for the period 2011 to 2014, the Authority does not consider that technological convergence equates to convergence of the cost to terminate a call to a mobile compared to a fixed location.

## **3. The Authority's expectations**

The Authority expects the imposition of pro-competitive terms and conditions on Markets 1 and 2 to achieve the following:

- a. A more efficient and effective access regime;
- b. A more dynamic retail pricing environment; and
- c. Continued access and investment in electronic communications networks in South Africa.

### **3.1 A more efficient and effective access regime**

1. The aim of the RIO is to remove any potential imbalance between licensees when commercially negotiating interconnection agreements. Furthermore, the Authority expects such interconnection agreements that are concluded to foster the efficient use of networks, i.e. stimulating the use of transit services or hosting arrangements where many licensees may interconnect with each other at a few distinct geographic locations.
2. The Authority expects the following to be visible outcomes of the imposition of the RIO obligation:
  - a. Reduced timeframes for concluding interconnection agreements;
  - b. Reduced and justifiable non-price obligations on both parties to an interconnection agreement;
  - c. More efficient use of networks through the use of transit services and specific hosting centres.
3. The Authority expects the impact of the above to lead to a reduction in the input costs for points of interconnection (both in time and infrastructure) thereby reducing the cost burden on existing and new entrants alike. The Authority expects the following feed-through impact to be:
  - a. A greater number of licensees considering entering the retail voice services market;
  - b. An increase in volumes of traffic between networks; and
  - c. More competitive retail price offerings, particularly in the offering of retail voice services to a fixed location.



### **3.2 A more dynamic retail pricing environment through a reduction in wholesale voice call termination rates**

1. The retail price environment is where licensees are able to leverage off their economies of scale and scope as well as the ability to set prices for other licensees in terms of the price offered to end-users for off-net calls.
2. A reduction in termination rates does not necessarily feed through directly to a reduction in retail rates.
3. The objective of reducing wholesale voice call termination rates is to reduce the barrier to entry in the provision of off-net calls thereby fostering competition and a dynamic reduction in retail prices over time.
4. The Authority expects the following to be visible outcomes of a reduction in wholesale voice call termination rates:
  - a. A reduction in the barriers to entry for competitors in competing for a broader spectrum of the retail market, i.e. smaller licensees are expected to move away from a pure niche retail market focus towards greater overall participation in the provision of services to all consumers;
  - b. A reduction in the price charged to an end-user for a voice call placed from a fixed location to a mobile location; and
  - c. An increase in dynamic pricing packages for voice calls between networks of licensees who offer termination to a mobile location.
5. The Authority expects the impact of the above to be the following:
  - a. An increase in the level of competition in the provision of retail services to end-users at a fixed location;
  - b. A reduction in the price of a call from a fixed to a mobile location; and
  - c. A reduction in the price of a call from a mobile location to both mobile and fixed locations over time as licensees adjust to greater competitive pressures.

### **3.3 Continued access and investment in electronic communications networks in South Africa**

The Authority's determinations are considered to be suitable for fostering competition as well as ensuring the correct incentives for long-term sustainable investments in enhancing geographic coverage and penetration for all services.



#### 4. Conclusions

1. As stated by stakeholders<sup>10</sup>, the regulation of termination rates in South Africa has been benign. This benign environment allowed for both the diffusion and geographic availability of a multitude of services, notably mobile telephony services.
2. However, it is now time for all South Africans to benefit from the existence of the past benign environment. The Authority now believes it necessary for termination rates to be lowered to foster competition and allow the benefits of the past regime to flow through to end-users, ultimately in lower retail prices.
3. The Authority will vigilantly monitor all trends to ensure that the implementation of the pro-competitive terms and conditions imposed in these regulations takes place quickly and without any infraction.

<sup>10</sup> See, for example, page 7 of the transcripts of the public hearings on the draft Call Termination Regulations held on the 28<sup>th</sup> of June 2010.

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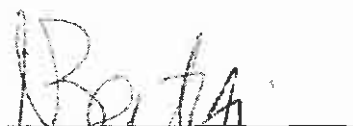
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**NOTICE 65 OF 2014****INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

**"CALL TERMINATION REGULATIONS, 2014"**  
**PURSUANT TO SECTION 67(8) OF THE ELECTRONIC**  
**COMMUNICATIONS ACT NO. 36 OF 2005**

I, Nomvuyiso Batyi, Acting Chairperson of the Independent Communications Authority of South Africa hereby publish the Regulations set out in the Schedule in terms of section 4 read with section 67(8) of the Electronic Communications Act No. 36 of 2005.

  
Nomvuyiso Batyi  
Acting Chairperson**31 January 2014**

## SCHEDULE

### **"CALL TERMINATION REGULATIONS, 2014" PURSUANT TO SECTION 67(8) OF THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005**

#### **1. DEFINITIONS**

In these Regulations, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Electronic Communications Act, 2005 (Act No. 36 of 2005); or the ICASA Act (Act No. 13 of 2000) has the meaning so assigned, and the following words and expressions shall have the meaning set out below:

**"the Act"** means the Electronic Communications Act, 2005 (Act No. 36 of 2005);

**"B0N"** means between geographic area codes as specified in Regulation 6 of the Numbering Plan Regulations;

**"ECNS"** means an electronic communications network service as defined in the Act;

**"ECS"** means an electronic communications service as defined in the Act;

**"LRIC"** means the Long Run Incremental Cost Standard

**"SMP"** means significant market power as defined in section 67(5) of the Act;

**"W0N"** means within a geographic area code as specified in Regulation 6 of the Numbering Plan Regulations



## 2. PURPOSE OF REGULATIONS

The purpose of these Regulations is to: -

- (a) Define and identify the wholesale call termination markets that exist within the Republic of South Africa based on trends post 2010;
- (b) Set out the methodology used to determine the effectiveness of competition in such markets post 2010;
- (c) Declare licensees that have SMP in the wholesale call termination markets;
- (d) Set out the pro-competitive measures to be imposed by the Authority to remedy market failure in the wholesale call termination markets;
- (e) Set out the schedule for periodic review of the wholesale call termination markets and the effectiveness of competition in such markets; and
- (f) Provide for monitoring and investigation of anti-competitive behaviour in the wholesale call termination markets.

## 3. MARKET DEFINITION

The markets are categorised according to the type of service provided to the end-user and are defined as follows:

- (a) Market 1: The market for wholesale voice call termination services to a mobile location on the network of each ECS/ECNS licensee who offers such a service within the Republic of South Africa.
- (b) Market 2: The market for wholesale voice call termination services to a fixed location on the network of each ECS/ECNS licensee who offers such a service within the Republic of South Africa.

## 4. METHODOLOGY

In determining the effectiveness of competition in the wholesale voice call termination markets, the Authority has applied the following methodology:





- (a) the identification of relevant markets and their definition according to the principles of the Hypothetical Monopolist Test, taking into account the non-transitory (structural, legal, or regulatory) entry barriers to the relevant markets and the dynamic character and functioning of the relevant markets;
- (b) the assessment of licensees' market shares in the relevant markets; and
- (c) the assessment on a forward-looking basis of the level of competition and market power in the relevant markets.

## 5. EFFECTIVENESS OF COMPETITION

Pursuant to regulation 4, the Authority has determined that competition in the wholesale voice call termination markets, as defined in regulation 3, is ineffective.

## 6. SMP DETERMINATION

The Authority determines that each ECNS and ECS licensee that offers wholesale voice call termination services has SMP in its own market.

## 7. PRO-COMPETITIVE TERMS AND CONDITIONS

- (1) The Authority has identified inefficient pricing as the cause of the market failure in the respective wholesale voice call termination markets.
- (2) Licensees declared to have SMP in terms of regulation 6 must charge fair and reasonable prices consistent with Appendix A in order to address the market failures as identified in sub-regulation(1).
- (3) The Authority has determined that additional pro-competitive terms and conditions are necessary to correct the market failures identified in sub-regulation(1), which are to be imposed on the licensees that benefit from economies of scale and scope in maintaining a share of retail market revenue generated in the respective markets of greater than 20% as of December 2012, namely:
  - (a) Market 1:
    - (i) MTN Pty Ltd (MTN)
    - (ii) Vodacom Pty Ltd (Vodacom)



## (b) Market 2:

Telkom SA SOC Limited (Telkom)

- (4) Additional pro-competitive terms and conditions that licensees mentioned in sub-regulation (3) must adhere to are :

## (a) Price Control: Cost oriented pricing

- (i) For the period 01 March 2014 to 01 March 2016, the licensees identified in sub-regulation (3)(a) must charge the wholesale voice call termination rates to a mobile location as specified in Table 1:

**Table 1: Wholesale voice call termination rates to a mobile location (Market 1)**

| Period       | Rate   |
|--------------|--------|
| 1 March 2014 | R 0.20 |
| 1 March 2015 | R 0.15 |
| 1 March 2016 | R 0.10 |

- (ii) For the period 01 March 2014 to 01 March 2016, the licensees identified in sub-regulation 3(b) must charge the wholesale voice call termination rates to a fixed location as specified in Table 2:

**Table 2: Wholesale voice call termination rates to a fixed location (Market 2)**

| Period       | W0N   | B0N |
|--------------|-------|-----|
| 1 March 2014 | R0.12 | 16  |
| 1 March 2015 | R0.12 | 12  |
| 1 March 2016 | R0.10 | 10  |

## (b) LRIC Cost Model

- (i) Licensees are obliged to provide any information the Authority deems necessary to develop such a Cost Model.
- (ii) Information requests are to be complied with within 30 working days of receiving the request.

**8. SCHEDULE FOR REVIEW OR REVISION OF MARKETS**

The Authority will review the wholesale voice call termination markets to which these regulations apply, as well as the effectiveness of competition and the application of pro-competitive measures in those markets, after a minimum period of three (3) years from the 1<sup>st</sup> March 2014.

**9. CONTRAVENTIONS AND PENALTIES**

- (1) A licensee that fails to comply with regulation 7(2) is liable to a fine of Five Hundred Thousand Rand (R 500 000.00).
- (2) A licensee that fails to comply with regulation 7(4) is liable to a fine not exceeding One Million Rand (R 1 000 000.00).

**10. SHORT TITLE AND COMMENCEMENT**

These regulations are called the "Call Termination Regulations, 2014" and will become effective as of 1<sup>st</sup> March 2014.



## **Appendix A: APPLICATION OF THE FAIR AND REASONABLE OBLIGATION**

### **1. PRINCIPLES OF IMPLEMENTATION OF FAIR AND REASONABLE OBLIGATION**

1.1. For the purposes of regulation 7(2), "fair and reasonable prices" are rates that are equivalent to the cost-oriented rates imposed on the licensees identified in regulation 7(3).

1.2. Licensees must charge the following rates:

1.2.1. Reciprocal rates with the rate set for MTN and Vodacom if these licensees are in Market 1;

1.2.2. Reciprocal rates with the rate set for Telkom if these licensees are in Market 2.

2. Licensees not listed in regulation 7(3)(a) may charge higher termination rates based on the following factors:

2.1. Economies of scale and scope based on the share of total retail revenue generated in the relevant market. A licensee qualifies, for a period of three (3) years from the 1<sup>st</sup> March 2014, for an asymmetric rate if it has less than 20% of total retail revenue in the relevant market as of December 2012.

2.2. Thereafter, a licensee qualifies for an ongoing asymmetric rate of R0.20 if it has a retail revenue market share of less than or equal to 10% of total retail revenue in the relevant market.

2.3. Licensees with a retail revenue market share of greater than 10% after three (3) years have passed are obliged to charge symmetrical rates.

2.4. A licensee who qualifies for an asymmetric rate in Market 1 may charge a maximum rate according to the following table:



Table A1: Maximum Asymmetry Rate for Market 1 (Mobile)

|                        | Maximum rate that may be charged |
|------------------------|----------------------------------|
| Current                | R 0.44                           |
| 01-Mar-14              | R 0.44                           |
| 01-Mar-15              | R 0.42                           |
| 01-Mar-16              | R 0.40                           |
| 01 Mar-17 <sup>1</sup> | R 0.20                           |

3. Licensees not listed in regulation 7(3)(b) may charge higher termination rates based on the following factors:

- 3.1. Economies of scale and scope based on the share of total retail revenue in the relevant market. A licensee qualifies, for a period of three (3) years from the 1<sup>st</sup> March 2014, for an asymmetric rate if it has less than 20 per cent of total retail revenue in the relevant market as of December 2012.
- 3.2. Thereafter, a licensee qualifies for an ongoing asymmetric rate of R0.13 if it has a retail revenue market share of less than or equal to 10 per cent of total retail revenue in the relevant market.
- 3.3. Licensees with a market share of greater than 10% after three (3) years have passed are obliged to charge symmetrical rates.
- 3.4. A licensee who qualifies for an asymmetric rate in Market 1 may charge a maximum rate according to the following table:

Table A2: Maximum Asymmetry Rate for Market 2 (Fixed)

|                          | WON RATE | BON RATE |
|--------------------------|----------|----------|
| Current                  | R 0.13   | R 0.21   |
| 01-Mar-14                | R 0.13   | R 0.21   |
| 01-Mar-15                | R 0.13   | R 0.13   |
| 01-Mar-16                | R 0.13   | R 0.13   |
| 01 Mar-17 <sup>1,2</sup> | R 0.13   | R 0.13   |

<sup>1</sup> The R0.20 asymmetry rate will continue indefinitely for qualifying licensees in Market 1, that is those with less than 10% market share by revenue in the mobile market.

The R0.13 asymmetry rate will continue indefinitely for qualifying licensees in Market 2, that is those with less than 10% market share by revenue in the fixed market.

## Explanatory Note to the 2014 Call Termination Regulations

### 1. Introduction

- 1.1. The Authority introduced cost-oriented termination rates through the Wholesale Voice Call Termination Regulations (GG 33698) in October 2010.<sup>1</sup>
- 1.2. The Authority has reviewed these regulations (GG 33698) in terms of section 67 (4) (e) read with (8) of the Electronic Communications Act, no 35 of 2006 (the "ECA"), where Section 67(8) states the following:

*67(8) Review of pro-competitive conditions:*

*(a) Where the Authority undertakes a review of the pro-competitive conditions imposed upon one or more licensees under this subsection, the Authority must—*

*(i) review the market determinations made on the basis of earlier analysis; and*

*(ii) decide whether to modify the pro-competitive conditions set by reference to a market determination*

- 1.3. The Authority informed stakeholders of its intention to conduct such a review with the Request for Information issued in Government Gazette 36532 issued on the 4<sup>th</sup> of June 2013.
- 1.4. This Explanatory Note to the Call Termination Regulations, 2014, entails the Authority's response to the submissions made by the stakeholders and is structured as follows:
- 1.4.1. Market definition
  - 1.4.2. Determination of Significant Market Power
  - 1.4.3. Evaluation of the Effectiveness of Competition
  - 1.4.4. Pro-competitive remedies

### 2. Market Definition

- 2.1. The Authority sees no need to amend the definitions of the markets as determined in 2010 because there is no technical change that changes the characteristics of termination to a mobile versus fixed location.

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<sup>1</sup> Wholesale Voice Call Termination Regulations (GG 33698) 29 October 2010



2.2. However, the Authority has removed the distinction between termination to a fixed location within and between an ON<sup>2</sup> area code in the second year.

2.3. The Authority has made this determination based on prevailing market conditions.

2.4. Therefore the market definitions for wholesale voice call termination are:

2.4.1. Market 1: The market for wholesale voice call termination services to a mobile location on each ECS/ECNS licensee's network who offers such a service within the Republic of South Africa.

2.4.2. Market 2: The market for wholesale voice call termination services to a fixed location on each ECS/ECNS licensee's network who offers such a service within the Republic of South Africa.

### 3. Determination of Significant Market Power

3.1. In the Draft Wholesale Voice Call Termination Regulations of 2013 (GG 36919).<sup>3</sup>, the Authority maintained the 2010 determination that:

*"each ECNS and ECS licensee that offers wholesale voice call termination services has SMP in its own market"*<sup>4</sup>

3.2. The Authority has retained this determination in the Regulations because each licensee controls wholesale voice call access to its own network.

### 4. Evaluation of the Effectiveness of Competition

4.1. The Authority put forward its conclusion regarding the evaluation of the effectiveness of competition in the relevant markets in Regulation 5 of GG 36919 and in Section 4.3 of the Explanatory Note to the Draft Call Termination Regulations (GG 36919, Page 12).

4.2. MTN and Vodacom raised concerns as to how the Authority determined that "competition in the wholesale voice call termination markets is ineffective."

4.3. Using the methodology in terms of Section 67(6) of the ECA, the Authority retained the conclusions put forward in the Call Termination Regulations of 29 October 2010 (GG 33698),

<sup>2</sup> As per the National Numbering Plan

<sup>3</sup> The Draft Call Termination Regulations and the Explanatory Note, thereto, as released in GG 36919 on 11 October 2013, are referred to as "GG 36919" throughout the remainder of this document.

<sup>4</sup> Regulation 6 of the 2010 Regulations.



that there is ineffective competition in the market for the provision of voice call termination services.

## 5. Pro-competitive Remedies

5.1. The pro-competitive remedies aim to rectify inefficient pricing<sup>5</sup> as the identified market failure. The market failure arose as a result of the use of different costing methodologies as used by the Authority in the 2010 Regulations (GG 33698). This is explained below:

5.1.1. In 2010, the Authority calculated the mobile termination rate using the Fully Allocated Cost (FAC) Methodology which included the cost of network coverage in the provision of termination services, whilst using the Long Run Incremental Cost Methodology (LRIC) for termination to a fixed location, which excluded the cost of network coverage.

5.1.2. This earlier determination created a distortion in the termination rates payable in and between the two markets. These regulations remove this distortion by reducing the share of the cost of access included in the determination for termination rates in both markets.

### The Termination Rates

5.2. Stakeholders submitted their views on the target termination rates for Markets 1 and 2. They recommended that the appropriate manner of setting termination rates is by way of cost modelling and that where cost models are not used; there is a risk of setting a wrong price level. In addition, they contended that the target rate of R0.10 was too low for South Africa where extensive further investment in mobile networks is still required, especially to provide wireless broadband.

5.3. The Authority applied a LRIC-based financial model to determine the termination rates for both Markets 1 and 2. This was based on information available to the Authority. In addition, benchmarking was carried out in order to validate the results of the financial model; and the Authority, therefore, determines that the target rate is appropriate.

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<sup>5</sup> See GG 33121 p 69 para 3.3.1 onwards



- 5.4. A number of submissions put forward the view that mobile and fixed rates should gradually converge given the convergence of technologies used in both Markets 1 and 2.
- 5.5. During the one on one meetings the Authority had with interested parties and in written representations, some stakeholders raised concerns about creating distortions in the market, specifically with an increase in the WON fixed line rate.
- 5.6. The Authority agrees with the above view and this is reflected in the revised rates as depicted below.
- 5.7. The Authority hereby confirms the rates for Markets 1 and 2 as follows:

*Table 1: Wholesale voice call termination rates to a mobile location (Market 1)*

| Period       | Rate   |
|--------------|--------|
| 1 March 2014 | R 0.20 |
| 1 March 2015 | R 0.15 |
| 1 March 2016 | R 0.10 |

*Table 2: Wholesale Voice Call Termination Rates to a Fixed Location (Market 2)*

| Period       | WON   | BON   |
|--------------|-------|-------|
| 1 March 2014 | R0.12 | R0.16 |
| 1 March 2015 | R0.12 | R0.12 |
| 1 March 2016 | R0.10 | R0.10 |

#### Asymmetry

- 5.7. Vodacom, MTN and Switch Telecoms<sup>6</sup> also expressed their views on the proposed asymmetry, including the level, period and criteria employed for qualification. They submitted that termination rate reductions alone should be sufficient to address market failures and that additional pro-competitive remedies would result in disproportionate over-regulation.

<sup>6</sup> The Authority noted and considered the responses from all licensees to various issues raised in the Draft Call Termination Regulations (GG 36919). However, some may not have been expressly mentioned if their views were representative of common views expressed by other licensees.

- 5.8. The Authority's analysis of market conditions revealed little change since 2010. Termination rates represent a price floor to off net calls; the higher the termination rate, the more difficult it is for new entrants to compete. The Authority's position is that new entrants and small players still require additional pro-competitive support in order to facilitate market entry and thus foster more infrastructure-based competition.
- 5.9. Vodacom and MTN submitted that licensees in Market 1 all have access to an equal amount of spectrum in the 900 MHz and 1800 MHz bands, therefore asymmetry for other players in this market on this criterion is not justified. The Authority is in agreement with the sentiments herein and hereby removes spectrum allocation as a criterion for asymmetry.
- 5.10. Vodacom, MTN and WBS expressed concern with how the Authority calculated market shares for both Markets 1 and 2. The Authority acknowledges submissions from stakeholders in this regard and confirms that it reverted to the principles applied in the 2010 Call Termination Market Review (GG 33698)<sup>7</sup> wherein retail market revenue share was the metric in use.
- 5.11. Vodacom, MTN and Switch Telecoms expressed concern with the need for asymmetry as well as the length of time proposed for asymmetry, citing that it is too long and is bound to promote inefficiencies. The Authority agrees that the opportunity to benefit from an asymmetrical termination rate cannot be granted in perpetuity. However, both the period and level of asymmetry need to be sufficient to address historical factors that created the lack of effective competition. The continued market failure indicates that the level of asymmetry provided to smaller operators was insufficient to generate effective competition. The Authority's position is that asymmetry is not an ongoing support mechanism for smaller operators and should be of limited duration. The Authority's recommended approach is that termination rates should tend towards symmetry over time; i.e. there should only be one rate in the market.
- 5.12. The Authority, therefore, determines the asymmetry period and levels shown in Table 3 below.

Table 3: Maximum Asymmetry Rate for Market 1

|               | Maximum Rate |
|---------------|--------------|
| 01 March 2014 | R 0.44       |
| 01 March 2015 | R 0.42       |
| 01 March 2016 | R 0.40       |

<sup>7</sup> Call Termination Market Review; 29 October 2010 GG 33698



|                            |        |
|----------------------------|--------|
| 01 March 2017 <sup>8</sup> | R 0.20 |
|----------------------------|--------|

Table 4: Maximum Asymmetry Rate for market 2

|                            | Maximum<br>Rate | WON | Maximum<br>Rate | BON |
|----------------------------|-----------------|-----|-----------------|-----|
| 01 March 2014              | R 0.13          |     | R 0.21          |     |
| 01 March 2015              | R 0.13          |     | R 0.13          |     |
| 01 March 2016              | R 0.13          |     | R 0.13          |     |
| 01 March 2017 <sup>9</sup> | R 0.13          |     | R 0.13          |     |

## 6. Conclusion

- 6.1. The Authority has reviewed and taken account of written submissions from all stakeholders.
- 6.2. The Authority has, where necessary, made amendments to GG 36919 which are designed to remedy the pricing inefficiencies identified during the review process.
- 6.3. The Authority maintains the position that the reduction in termination rates accompanied by a period of asymmetry for qualifying licensees is necessary for a dynamic pricing environment.
- 6.4. There a number of options that the Authority might consider in the future. These include zero or more of the following: -
  - 6.4.1. A further glide path, to termination rates which may be estimated on the basis of the cost data required from operators in Regulation 7(4)(b), which may be applied to a LRIC or other Cost Model. This may or may not include further asymmetry in order to support challenger networks and thus foster completion.
  - 6.4.2. The removal of per minute voice termination rates entirely, and the introduction of a Sender Keeps All scenario.
  - 6.4.3. A retail Market Review, addressing the distortions caused by excessive on-net / off-net retail price differentials.
  - 6.4.4. Focus on market determinations on data traffic costs, and perhaps mandatory multilateral peering at public IXPs.

<sup>8</sup> The R0.20 asymmetry rate will continue indefinitely for qualifying licensees in Market 1, that is those with less than 10% market share by revenue.

<sup>9</sup> The R0.13 asymmetry rate will continue indefinitely for qualifying licensees in Market 2, that is those with less than 10% market share by revenue.



## GENERAL NOTICE

## NOTICE 574 OF 2013



## INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA GENERAL NOTICE

## NOTICE OF INTENTION TO IMPLEMENT A COST TO COMMUNICATE PROGRAMME.

The Independent Communications Authority of South Africa (The Authority) hereby gives notice of its intention to Implement a Cost to Communicate Programme. This programme has the overall goal of:

- Achievement of fair and reasonable prices for products and services offered by licensees.

Enquires can be directed to:

Christian Mhlanga-Project Leader

Landline: 011 566 3637

Email: [cmhlanga@icasa.org.za](mailto:cmhlanga@icasa.org.za)

Cc: [pcokie@icasa.org.za](mailto:pcokie@icasa.org.za)

Approved:

A handwritten signature in black ink, appearing to be 'Dr. Stephen Mncube', written over a horizontal line.

Dr. Stephen Mncube

Chairperson

Date: 31/05/2013

A handwritten mark or signature in the bottom right corner of the page.

**1. PREAMBLE**

- 1.1. Section 4(3) (h) of the ICASA ACT 13 of 2000 "(ICASA Act)" states that the Authority may "conduct research on all matters affecting the broadcasting, postal and communications sectors in order to exercise its powers and perform its duties".
- 1.2. The Authority may, in terms of Section 4B of the ICASA Act no 13 of 2000 ( the Act); conduct an inquiry into any matter with regard to *inter alia*:
  - 1.2.1. The achievement of the objectives of the ICASA Act or underlying statutes;
  - 1.2.2. Regulations and guidelines made In terms of the Act or underlying statutes, and;
  - 1.2.3. The exercise and performance of its powers, functions and duties in terms of the Act or underlying statutes.
- 1.3. All written representations submitted to the Authority pursuant to this notice will be made available for inspection by interested persons at the Authority's library and copies of such representations will be obtainable on payment of the prescribed fee.
- 1.4. At the request of any person who submits written representations pursuant to this notice, the Authority will determine whether such representations or any portion thereof is confidential in terms of section 4D of the ICASA Act.
- 1.5. If the request for confidentiality is refused, the licensee making the request will be allowed to withdraw such representations or portion thereof.
- 1.6. Persons interested in participating in subsequent public hearings must indicate such interest in their written submission.
- 1.7. Public hearings, where relevant, will be convened as per the attached timelines per project.

**2. BACKGROUND TO INTRODUCTION OF THE COST TO COMMUNICATE IN SOUTH AFRICA**

- 2.1. The Authority has, since 2006, been focussing on reducing the high cost to communicate in South Africa. This resulted in initiatives such as the Call Termination Glide path, local loop unbundling and the enquiry into Wholesale Transmission Services, among others.
- 2.2. In addition, some stakeholders in the South African electronic communications industry and consumers at large have raised concerns in different *fora* regarding the high cost to communicate in South Africa.
- 2.3. Various benchmark studies support the concerns.



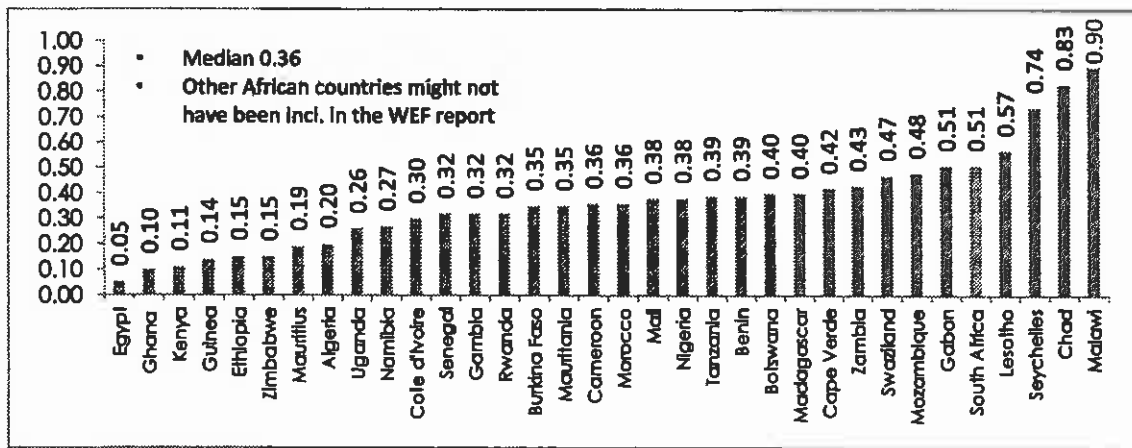
2.4. The World Economic Forum recently issued its Global IT report for 2013 which illustrates South Africa's low ranking in terms of mobile tariff charges relative to other countries around the world.

#### Mobile Cellular Tariffs (PPP\$)<sup>1</sup>

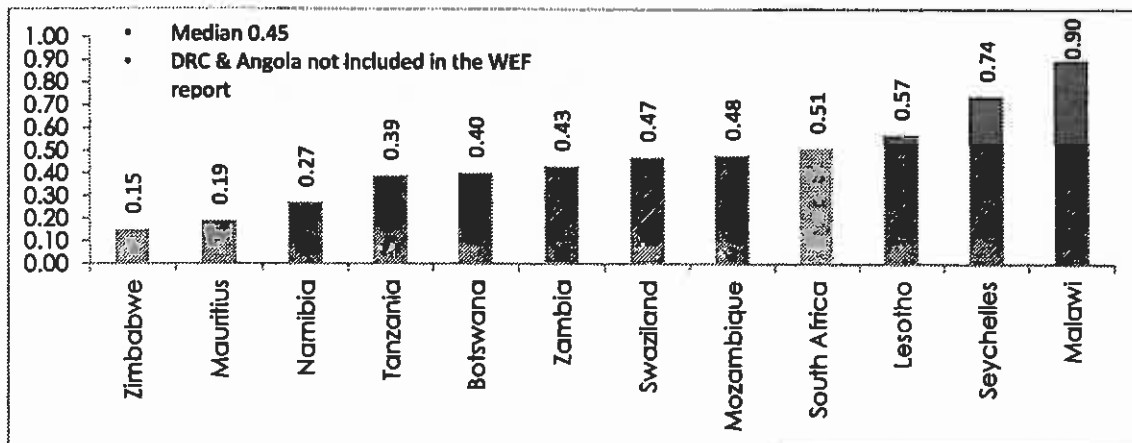
##### Highlights:

- SA ranked 117<sup>th</sup> out of 140 countries on a global scale
- SA ranked 28<sup>th</sup> out of 32 African countries
- SA ranked 9<sup>th</sup> out of 12 SADC countries

**Table 1: African Country Comparison**



**Table 2: SADC Comparison**



<sup>1</sup> World Economic Forum Global IT Report - 2013

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- 2.4.1. The above is reinforced by a report prepared by Research ICT Africa which illustrated that South Africa has a high cost to communicate when benchmarked against peer countries.<sup>2</sup>

Figure 1: Snapshot of a benchmark study on the Cost to Communicate - October 2010<sup>3</sup>

RESEARCH ICT AFRICA POLICY BRIEF NO. 1

## Africa Prepaid Mobile Price Index 2012: South Africa

*Among 46 African countries studied, South Africa ranks poorly for prepaid mobile telephony affordability. Ranked 32nd out of 46 African states, South Africa is now far behind countries where the regulator, unlike in South Africa, has enabled competition by enforcing cost-based mobile termination rates. The resulting competition has in many cases driven down prices for consumers. Not long ago, South Africa and Namibia shared the same mobile termination rates and had similar end-user prices. Today, Namibia enjoys amongst the cheapest mobile prepaid prices in Africa, as a result of the slashing of its termination rates to close-to-cost, which pressured the incumbents into real pricing.*

RIA Policy Brief No 1

March 2012

- 2.4.2. Table 3 below is an extract from a study conducted by Strategy Analytics (UK) and Pygma Consulting. It illustrates the fact that South Africa's cost to communicate is relatively high compared to peer countries.

<sup>2</sup> RIA Policy Brief No 1 – March 2012

<sup>3</sup> "Analysing the cost of mobile communications" by Strategy Analytics (UK) and Pygma Consulting (South Africa)- October 2012



**Table 3:** Purchasing Power Parity (PPP) rates used in study (SA ranked midway in the study sample)

| Country      | Currency | Exchange rate into US \$ | Exchange rate into ZAR | PPP rate into ZAR |
|--------------|----------|--------------------------|------------------------|-------------------|
| South Africa | ZAR      | 0.12760                  | 1.0000                 | 1.0000            |
| Colombia     | COP      | 0.00058                  | 0.0045                 | 0.0059            |
| Mexico       | MXN      | 0.07573                  | 0.5935                 | 0.5521            |
| Peru         | PEN      | 0.38430                  | 3.0118                 | 4.0588            |
| Venezuela    | VEF      | 0.23320                  | 1.8276                 | 2.0158            |
| Algeria      | DZD      | 0.01353                  | 0.1060                 | 0.1290            |
| Egypt        | EGP      | 0.16630                  | 1.3033                 | 2.8323            |
| Morocco      | MAD      | 0.11870                  | 0.9303                 | 1.0292            |
| Saudi Arabia | SAR      | 0.26670                  | 2.0901                 | 1.9780            |
| Poland       | PLN      | 0.31050                  | 2.4334                 | 2.5268            |
| Turkey       | TRY      | 0.56680                  | 4.4420                 | 4.1971            |

### 3. THE AUTHORITY'S STATEMENT OF INTENT

- 3.1. The Authority has a mandate to regulate in various areas of public interest. One of the Authority's key areas of engagement is the high cost to communicate in South Africa. As a result, the Authority has embarked on an initiative called the "Cost to Communicate Programme."
- 3.2. The programme seeks to achieve the following goals:
- 3.2.1. Stimulate public debate around the cost to communicate in South Africa
  - 3.2.2. Establish regulatory needs to address the cost to communicate in South Africa.
  - 3.2.3. Stimulate enhanced competition in the telecommunications sector which should result in:
    - 3.2.3.1. Increased consumer choice
    - 3.2.3.2. Enhanced ability to switch suppliers
    - 3.2.3.3. Increased transparency in product pricing offers (which currently are regarded as being generally opaque)
    - 3.2.3.4. Fair and reasonable wholesale and retail prices

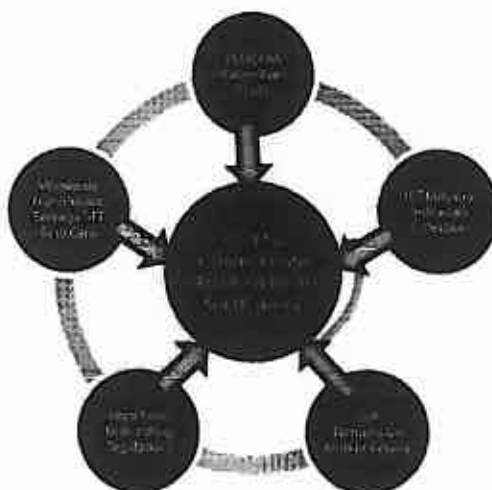
### 4. OUTLINE OF THE COST TO COMMUNICATE PROGRAMME

- 4.1. The Cost to Communicate programme currently consists of five projects that are expected to run until June 2015.



4.2. The Cost to Communicate programme is structured as follows.

**Fig 2: Components of the Cost to Communicate Programme**



## 5. SYNOPSIS OF PROJECTS UNDER REVIEW

### 5.1. BROADBAND VALUE CHAIN ANALYSIS

This is a formal Notice of Intention to carry out a value chain analysis of the electronic communications networks in South Africa.

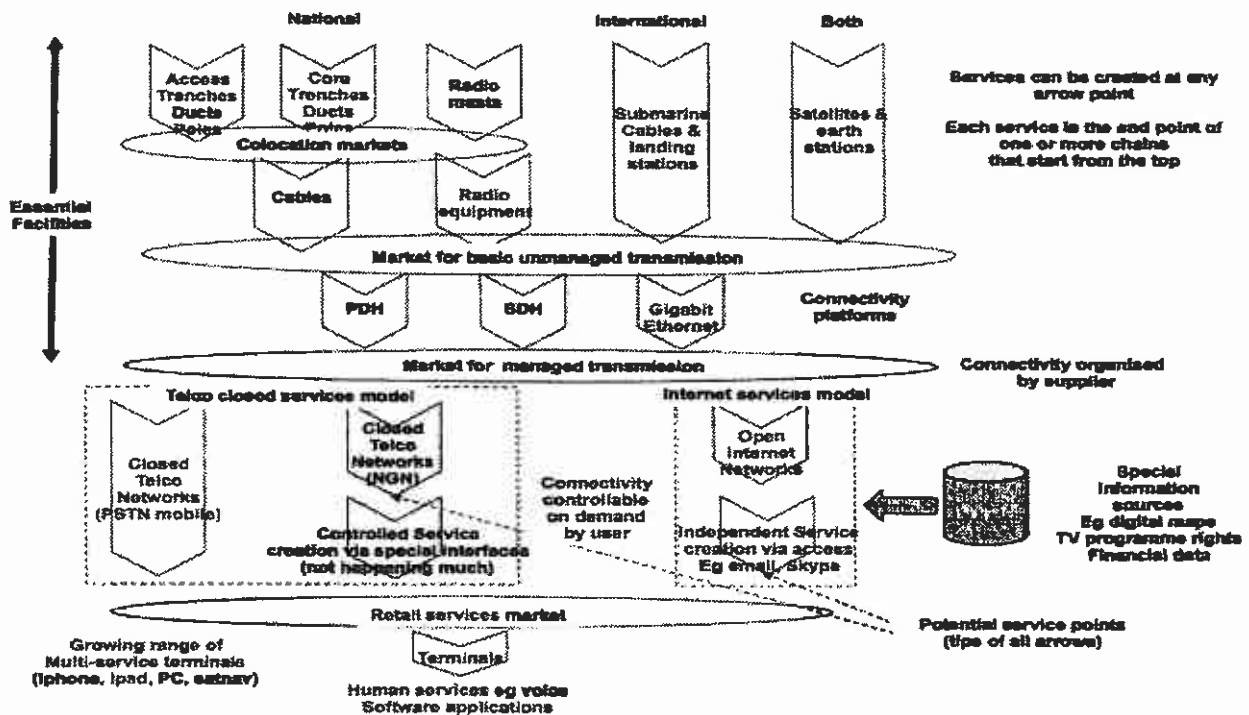
#### 5.1.1. Background:

5.1.1.1. The Authority intends to conduct an electronic communications network and services value chain analysis of the South African telecommunications industry. The value chain framework which will guide this study is illustrated in Figure 4 below. The diagram shows a simplified value chain with each arrowhead representing a potential essential facility or potential service.

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**Figure: 4 Possible services along the Value Chain Framework**

5.1.1.2. These services are based on the definitions of facilities as per the ECA



5.1.1.3. The value chain analysis aims to consider all possible facilities and services within the electronic communications network and services in the telecommunications industry. All potential facilities and wholesale services will be considered, since a market failure may prevent a service from being offered and require a remedy.

5.1.1.4. The main focus of the study will be to define the broadband value chain, identify where, along the value chain, there is ineffective competition, and if ineffective competition exists, determine potential remedies to address this ineffective competition.

## 5.1.2. TIMEFRAMES

5.1.2.1. The total duration of this enquiry process is expected to be 9 months with the expected timeframe being as follows:

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| Project Timelines                            | Implementation Dates        |
|--|-----------------------------|
| Request For Information                      | 14 June 2013 - 15 July 2013 |
| Release Discussion Document public comment   | 19 August 2013              |
| Public Hearings                              | 5 September 2013            |
| Publish Findings Document                    | 1 November 2013             |
| Release Draft Regulations for public comment | 10 December 2013            |
| Publish Final Regulations                    | 14 April 2014               |

## 6. CALL TERMINATION MARKET REVIEW OF REGULATIONS

This is a formal Notice of the review of the Call Termination Regulations of October 2010.

### 6.1.1. Background

- 6.1.1.1. Voice call termination is the service that one network offers another to carry voice traffic to its end-users. It is the charge for this service that has been the subject of concern where it has been viewed as a constraint to effective competition as well as a driver of high retail prices of telecommunications in South Africa.
- 6.1.1.2. The debate around call termination fees started in 2007, with the Authority releasing a discussion document and subsequently a findings document on the definition of the market for call termination services.
- 6.1.1.3. The Authority subsequently carried out a Section 67 market review which resulted in the Call Termination Regulations of October 2010.<sup>4</sup>

### 6.1.2. THE AUTHORITY'S APPROACH TO THE REVIEW

- 6.1.2.1. In carrying out the review, the Authority will limit its scope to Section 67 (8) of the ECA.
- 6.1.2.2. The review will not consider revisions of either the market definitions or SMP determinations as these will not have changed.

<sup>4</sup> Government Gazette 33698 of 29 October 2010



**6.1.2.3. TIMEFRAMES**

6.1.2.3.1. The timelines for completion of the review of call termination regulations is as tabulated below:

| PROJECT TIMELINES                                 | IMPLEMENTATION PERIOD  |
|---|------------------------|
| Request for Information                           | 10 June 2013           |
| One-on-One engagement with Licensees              | From 1 to 12 July 2013 |
| Receipt of written responses from licensees       | 26 July 2013           |
| Publication of discussion document                | 9 August 2013          |
| Public Hearings                                   | 2-3 September 2013     |
| Publication of final call termination regulations | 25 October 2013        |



**7 LOCAL LOOP UNBUNDLING****7.2.1 What is the "Local Loop"?**

7.2.1.1 The Local Loop is the "piece of string" that connects the home/building to the local exchange of the fixed line network. This typically includes a number of network components, including the distribution panel, the street distribution cabinet up to the main distribution frame in a local exchange building and the copper twisted pairs connecting these.

**7.2.2 The Authority's Position on the Local Loop**

7.2.2.1 The Authority is currently awaiting the conclusion of the review of the CCC ruling of 24 August 2012.

7.2.2.2 In the interim, the Authority will publish draft regulations governing the manner in which copper local loops shall be unbundled in South Africa and these draft regulations are designed to obtain an industry view. However, the regulations shall not take effect until after the completion of the CCC ruling review process.

7.2.2.3 Further, the regulations will require licensees to provide information to the Authority in order to establish the efficacy of bitstream and shared/full loop unbundling over time.



### **7.3 ICT INDICATORS**

#### **7.3.1 Background**

- 7.3.1.1 One of the Authority's mandates is the monitoring and evaluation of the state of ICT in South Africa. This enables effective planning for policy and regulation-making purposes as well as benchmarking South Africa against peer countries.
- 7.3.1.2 To achieve this, the Authority requires licensees to submit indicator data in a specified format at specific periods during the year.
- 7.3.1.3 The collection and collation of data is also done in fulfilment of ICASA's regulatory obligations as a member of the International Telecommunication Union (ITU).
- 7.3.1.4 The ITU collects data for indicators from member countries through the country's telecommunication regulatory authority or relevant Government Ministry, by means of questionnaires sent bi-annually. These questionnaires are in a form of a short and a long questionnaire and are sent in March and June, respectively.
- 7.3.1.5 The data collected is used to update the World Telecommunication/ICT Indicators database, which is the basis of the ITU's statistical publications, including the Yearbook of Statistics and the World Telecommunication/ICT Development Report. The data is also used by the UN System, the World Bank and other international and regional organisations.
- 7.3.1.6 The Authority will also request any other information relevant to identified initiatives. The Authority will clearly communicate the information required and the purpose of such information as and when required.

#### **7.3.2 Legal Provisions for data requests**

- 7.3.2.1 The Authority has the legal right to request information, as per the provisions of Section 4 (2) (g) of the ICASA Act No. 13 of 2000. These provisions should be read with the regulations regarding standard terms and conditions for individual licenses under Chapter 3 of the Electronic Communications Act no. 36 of 2005 as prescribed by the Authority in terms of Section 8, read with Section 4 of the ECA and 17E(2) of the ICASA Act, 13 of 2000.

#### **7.3.3 Confidentiality**

- 7.3.3.1 The information gathered which is sensitive will be kept confidential should an operator specify that such information is confidential as provided for in the confidentiality clause provided for in Section 4D of the ICASA Act No. 13 of 2000.



**7.3.4 How Information Is collected**

7.3.4.1 The Authority will collect information using an online questionnaire that can be downloaded or filled in *in situ*.

7.3.4.2 The Authority may also conduct information gap-filling interviews with licensees on a one-to-one basis.

7.3.4.3 The questionnaire will, at a minimum, cover:

- Subscriber information
- Tariff information
- Traffic information
- Employment information
- Revenue, expenses and investment
- Faults, billing and complaints
- Infrastructure

7.3.4.4 The questionnaire may take either of two formats

7.3.4.4.1 Standard ITU questionnaire which will be disseminated to licensees without amendment and whose responses will be forwarded to the ITU.

7.3.4.4.2 An ICASA-generated questionnaire based on specific requirements at any particular period.

7.3.4.5 Licensees will be advised of the manner in which the collected information is to be used at the time the information request is published.

**7.3.5 How data will be used by the Authority**

7.3.5.1 The Authority has developed an online ICT Indicators portal which is designed to be the official ICT information landing page for anyone requiring information on the ICT sector in South Africa.

7.3.5.2 This portal will rely on information submitted by licensees and accredited research bodies as well as affiliated government bodies.

7.3.5.3 The Authority will release certain components of the portal for public consumption, generally as consolidated figures.

7.3.5.4 Such data will be accessible via the ICASA website. ([www.icasa.org.za](http://www.icasa.org.za))

**7.3.6 Current Project Status**

7.3.6.1 The Authority launched the online ICT portal in March 2013.

7.3.6.2 Licensees submitted initial data based on a questionnaire and the portal has been populated.



7.3.6.3 Information gaps still exist where incomplete data was submitted by licensees or data was not submitted at all.

### **7.3.7 Timelines**

7.3.7.1 This is an on-going project and licensees should expect periodic information requests linked to this component of the Cost to Communicate Programme

## **8 Digital Terrestrial Television (DTT) Rate Card – Broadcasting Wholesale Transmission Services**

### **8.2.1 Background to the Wholesale Transmission Services Project**

8.2.1.1 The Authority initiated an inquiry into the provision of wholesale broadcasting transmission services under Section 4B of the Independent Communications of South Africa Act (the "ICASA" Act, no 13 of 2000) in response to complaints by a free-to-air television broadcaster and a number of community radio broadcasters regarding alleged excessive pricing and low quality of service standards by Sentech Limited ("Sentech").

### **8.2.2 Current Project Status**

8.2.2.1 The Authority has concluded the market inquiry into the Wholesale Transmission Services and thus notifies all stakeholders that it intends initiating a regulation-making process under Section 67(4) of the ECA to ensure that pro-competitive conditions are imposed upon licensees having SMP.

## **9 CONCLUSION**

9.2.1 Licensees are to expect a significant number of requests for information from the Authority in the coming months. This is necessary to overcome the information asymmetry that exists between the Authority and stakeholders. These information requests will consist of both quantitative and qualitative questions.

9.2.2 The Authority will keep all stakeholders up to date as and when identified milestones are achieved.

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## GENERAL NOTICE

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### NOTICE 1018 OF 2013



#### INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

#### **"DRAFT CALL TERMINATION REGULATIONS" PURSUANT TO SECTION 67(4) OF THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005**

I, Stephen Mncube, Chairperson of the Independent Communications Authority of South Africa hereby publish the draft Regulations set out in the Schedule in terms of section 4 read with section 67(8) of the Electronic Communications Act No. 36 of 2005.

---

Dr Stephen Mncube  
Chairperson

**“DRAFT CALL TERMINATION REGULATIONS”  
PURSUANT TO SECTION 67(4) OF THE ELECTRONIC  
COMMUNICATIONS ACT NO. 36 OF 2005**

**1. DEFINITIONS**

In these Regulations, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act or the ICASA Act, 2000 (Act No. 13 of 2000), as amended, has the meaning so assigned, and the following words and expressions shall have the meaning set out below:

**“ON”** means a geographic area code as specified in the Numbering Plan Regulations published by the Authority;

**“the Act”** means the Electronic Communications Act, 2005 (Act No. 36 of 2005);

**“ECNS”** means an electronic communications network service as defined in the Act;

**“ECS”** means an electronic communications service as defined in the Act;

**“Fixed voice call termination service”** means a wholesale voice call termination service provided by an ECNS or ECS licensee to a fixed location, and includes such a service provided by a licensee providing call termination using fixed wireless services;

**“LRIC”** means the Long Run Incremental Cost Standard

**“Mobile voice call termination service”** means a wholesale call termination service provided by an ECNS or ECS licensee to mobile subscriber equipment enabled by wireless technology;

**“Retail service”** means a service offered by an ECS licensee to end-users;

**“SMP”** means significant market power as defined in section 67(5) of the Act;

**“Wholesale service”** means a service that an ECS or ECNS licensee offers other ECS or ECNS licensees.



## 2. PURPOSE OF REGULATIONS

The purpose of these Regulations is to: -

- (a) Define and identify the wholesale call termination markets that exist within the Republic of South Africa based on trends post 2010;
- (b) Set out the methodology used in the review of the effectiveness of competition in such markets post 2010;
- (c) Declare licensees that have SMP in terms of paragraphs (a) and (b) above;
- (d) Set out the pro-competitive measures to be imposed to remedy market failure in the relevant markets found to have ineffective competition;
- (e) Set out the schedule for periodic review of the relevant markets and the effectiveness of competition in such markets; and
- (f) Provide for the enforcement of these Regulations.

## 3. MARKET DEFINITION

The markets are categorised according to the type of service provided to the end-user and are defined as follows:

- (a) Market 1: The market for wholesale voice call termination services to a mobile location on the network of each ECS/ECNS licensee who offers such a service within the Republic.
- (b) Market 2: The market for wholesale voice call termination services to a fixed location on the network of each ECS/ECNS licensee who offers such a service within the Republic, consisting of:
  - i. The market segment for wholesale voice call termination to a fixed location within an 0N area code; and
  - ii. The market segment for wholesale voice call termination to a fixed location between 0N area codes.

A handwritten signature, possibly 'D. B.', is written in the bottom right corner of the page. Below the signature, the initials 'DB' are written.

#### 4. METHODOLOGY

In determining the effectiveness of competition in the wholesale voice call termination markets, the Authority has applied the following methodology:

- (a) the identification of relevant markets and their definition according to the principles of the Hypothetical Monopolist Test, taking into account the non-transitory (structural, legal, or regulatory) entry barriers to the relevant markets and the dynamic character and functioning of the relevant markets;
- (b) the assessment of licensees' market shares in the relevant markets; and
- (c) the assessment on a forward-looking basis of the level of competition and market power in the relevant markets.

#### 5. EFFECTIVENESS OF COMPETITION

Pursuant to regulation 4, the Authority has determined that competition in the wholesale voice call termination markets, as defined in regulation 3, is ineffective owing to inefficient pricing.

#### 6. SMP DETERMINATION

The Authority determines that each ECNS and ECS licensee that offers wholesale voice call termination services has SMP in its own market.

#### 7. PRO-COMPETITIVE TERMS AND CONDITIONS

- (1) The Authority has identified the following market failures in the respective wholesale voice call termination markets:
  - (a) inefficient pricing
- (2) All licensees must comply with the following pro-competitive terms and conditions to overcome the market failures identified in sub regulation (1):
  - (a) Charge fair and reasonable prices for wholesale voice call termination consistent with Appendix A
- (3) The Authority has determined that additional pro-competitive terms and conditions are necessary to correct the market failures identified in regulation 7(1), which are to be imposed on the following licensees:

  
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- (a) Licensees that have historically benefitted from reciprocal treatment by the Authority in the allocation of spectrum;
- (b) Licensees that benefit from economies of scale and scope in maintaining a share of total minutes terminated in the respective markets of greater than 20 per cent as of December 2012.
- (4) The Authority determines that the following licensees have the characteristics listed in sub regulation (3):
- (a) Market 1:
- i. MTN Pty Ltd (MTN)
  - ii. Vodacom Pty Ltd (Vodacom)
- (b) Market 2:
- i. Telkom SA SOC Limited (Telkom)
- (5) Additional pro-competitive terms and conditions
- (a) Price Control: Cost oriented pricing
- i. This obligation is imposed on those licensees listed in sub regulation (4).
  - ii. For the period 01 March 2014 to 01 March 2016, the licensees identified in sub regulation(4)(a) must charge the wholesale voice call termination rates to a mobile location as specified in Table 1:

**Table 1: Wholesale voice call termination rates to a mobile location (Market 1)**

| Period       | Rate   |
|--------------|--------|
| 1 March 2014 | R 0.20 |
| 1 March 2015 | R 0.15 |
| 1 March 2016 | R 0.10 |

- iii. For the period 01 March 2014 to 01 March 2016, the licensees identified in subregulation(4)(b) must charge the wholesale voice call termination rates to a fixed location as specified in Table 2:



**Table 2: Wholesale voice call termination rates to a fixed location  
(Market 2)**

| Period                          | Within ON<br>area code | Between ON<br>area code |
|---------------------------------|------------------------|-------------------------|
| 1 March 2014 to<br>1 March 2016 | R 0.12                 | R 0.19                  |

**(b) Bottom-up LRIC Cost Model**

- i. This obligation is imposed on those licensees listed in subregulation (4).
- ii. Such licensees are obliged to provide any information the Authority deems necessary to develop such a Cost Model
- iii. Information requests are to be complied with within 30 days of receiving the request.
- iv. The Authority may amend existing rates based on the outcomes of this model.

**8. SCHEDULE FOR REVIEW OR REVISION OF MARKETS**

The Authority will review the wholesale voice call termination markets to which these regulations apply, as well as the effectiveness of competition and the application of pro-competitive measures in those markets, as and when necessary, based on observable trends in the defined markets.

**9. CONTRAVENTIONS AND PENALTIES**

- (1) A licensee which fails to comply with regulation 7(2) is liable to a fine of Five Hundred Thousand Rand (R 500 000.00).
- (2) A licensee which fails to comply with regulation 7(5)(a), (b) is liable to a fine not exceeding One Million Rand (R 1 000 000.00).

**10. SHORT TITLE AND COMMENCEMENT**

These Regulations are called the Draft Call Termination Regulations and will become effective upon date of publication. All Stakeholders have 30 days to submit written comments on the draft regulations.



## **Appendix A: APPLICATION OF THE FAIR AND REASONABLE OBLIGATION**

### **1. PRINCIPLES OF IMPLEMENTATION OF FAIR AND REASONABLE OBLIGATION**

1.1. For the purposes of regulation 7(2)(a), "fair and reasonable" prices are rates that are equivalent to the cost-oriented rates imposed on the licensees identified in Regulation 7(4).

1.2. Licensees must charge the following rates:

1.2.1. Reciprocal rates with the rate set for MTN and Vodacom if these licensees are in Market 1;

1.2.2. Reciprocal rates with the rate set for Telkom if these licensees are in Market 2.

2. Licensees not listed in Regulation 7(4)(a) may charge higher termination rates based on the following factors:

2.1. Spectrum allocation. A licensee must justify why it is adversely affected by current spectrum allocation.

2.2. Economies of scale and scope based on the share of total minutes terminated in the relevant market. A licensee qualifies, for a period of 5 years from the 1<sup>st</sup> March 2014, for an asymmetric rate if it has less than 20 per cent of total terminated minutes in the relevant market as of December 2012.

2.3. Thereafter, a licensee qualifies for an ongoing asymmetric rate of 40% if it has a market share of less than or equal to 10 per cent of total terminated minutes in the relevant market.

2.4. Licensees with a market share of greater than 10% after five years have passed are obliged to charge symmetrical rates.

2.5. A licensee may only qualify for an asymmetric rate if both factors are applicable.

2.6. A licensee who qualifies for an asymmetric rate in Market 1 may charge a maximum rate) according to the following table:



Table A1: Maximum Asymmetry Rate

|           | Maximum rate that may be charged |
|-----------|----------------------------------|
| Current   | R 0.44                           |
| 01-Mar-14 | R 0.39                           |
| 01-Mar-15 | R 0.33                           |
| 01-Mar-16 | R 0.26                           |
| 01-Mar-17 | R 0.20                           |
| 01-Mar-18 | R 0.14                           |
| 01-Mar-19 | R 0.10                           |

3. Licensees not listed in Regulation 7(4)(b) may charge higher termination rates based on the following factor:

- 3.1. Economies of scale and scope based on the share of total minutes terminated in the relevant market. A licensee qualifies, for a period of 5 years from the 1<sup>st</sup> March 2014, for an asymmetric rate of 10% above the rates specified in Table 2 of these Regulations if it has less than 20 per cent of total terminated minutes in the relevant market as of December 2012.
- 3.2. Thereafter, a licensee qualifies for an ongoing asymmetric rate of 10% if it has a market share of less than or equal to 10 per cent of total terminated minutes in the relevant market.
- 3.3. Licensees with a market share of greater than 10% after five years have passed are obliged to charge symmetrical rates.





## Explanatory Note to the Draft Call Termination Regulations

### 1. Introduction

- 1.1. The Authority introduced cost-oriented termination rates through the Wholesale Voice Call Termination Regulations (GG 33698) in October 2010.
- 1.2. The Authority has reviewed these regulations in line with Section 67(8) of the Electronic Communications Act, no 35 of 2006 (the "ECA"), where Section 67(8) states the following:

*67(8) Review of pro-competitive conditions:*

- (a) Where the Authority undertakes a review of the pro-competitive conditions imposed upon one or more licensees under this subsection, the Authority must—*
  - (i) review the market determinations made on the basis of earlier analysis; and*
  - (ii) decide whether to modify the pro-competitive conditions set by reference to a market determination;*

- 1.3. The Authority informed stakeholders of its intention to conduct such a review using the Request for Information published in Government Gazette 36532 on the 4th of June 2013.
- 1.4. This explanatory note is structured as follows:
  - 1.4.1. Market definition
  - 1.4.2. Determination of Significant Market Power
  - 1.4.3. Evaluation of the effectiveness of competition
  - 1.4.4. Pro-competitive remedies

### 2. Market Definition

- 2.1. After analysis of the information requested from licensees by the Authority, the Authority sees no need to amend the definitions of the markets as determined in 2010 because there is no technical change that changes the characteristics of termination to a mobile versus fixed location<sup>1</sup>
- 2.2. Therefore the market definitions remain the same:
  - 2.2.1. Market 1: The market for wholesale voice call termination services to a mobile location on each ECS/ECNS licensee's network who offers such a service within the Republic of South Africa.
  - 2.2.2. Market 2: The market for wholesale voice call termination services to a fixed location on each ECS/ECNS licensee's network who offers such a service within the Republic of South Africa, consisting of:
    - 2.2.2.1. The market segment for wholesale voice call termination to a fixed location within the ON area code
    - 2.2.2.2. The market segment for wholesale voice call termination to a fixed location between ON area codes<sup>2</sup>

<sup>1</sup> See page 48 of Government Gazette 33121 of 16 April 2019

<sup>2</sup> As per the National Numbering Plan

### 3. Determination of Significant Market Power

3.1. In 2010 the Authority determined that:

*"each ECNS and ECS licensee that offers wholesale voice call termination services has SMP in its own market"*<sup>3</sup>

3.2. After analysis of the information requested from licensees by the Authority, the Authority sees no reason to amend this determination, as the nature of voice call termination has not changed.<sup>4</sup>

### 4. Determination on the Effectiveness of Competition

4.1. In 2010 the Authority determined that the two markets for call termination were ineffectively competitive for the following reasons

- 4.1.1. a lack of the provision of access
- 4.1.2. the potential for discrimination between licensees offering similar services
- 4.1.3. a lack of transparency
- 4.1.4. inefficient pricing

4.2. Upon review of the conditions of the market, the Authority determined that the two markets remain ineffectively competitive, with the two markets being highly concentrated.

*Table 1: Concentration in Market 1: Termination to a mobile location*

| Termination Revenue Shares |          |          |          |          |
|----------------------------|----------|----------|----------|----------|
|                            | Jun-2011 | Dec-2011 | Jun-2012 | Dec-2012 |
| Licensee 1                 | 36%      | 35%      | 36%      | 37%      |
| Licensee 2                 | 44%      | 44%      | 46%      | 45%      |
| Licensee 3                 | 16%      | 17%      | 15%      | 14%      |
| Licensee 4                 | 4%       | 3%       | 4%       | 3%       |
| HHI                        | 3499     | 3511     | 3618     | 3660     |

*Table 2: Concentration in Market 2: Termination to a fixed location*

|            | 2011 | 2012 |
|------------|------|------|
| Licensee 1 | 98%  | 94%  |
| Licensee 2 | 2%   | 6%   |
| HHI        | 9664 | 8912 |

4.3. The Authority determines that these markets remain ineffectively competitive owing to inefficient pricing.

### 5. Pro-competitive Remedies

<sup>3</sup> Regulation 6 of the 2010 Regulations (Government Gazette 33698)

<sup>4</sup> See Section 2.3 on Countervailing Bargaining Power in Government Gazette 33121

- 5.1. Amongst others, the Authority imposed cost-oriented pricing on the pricing arrangements for voice call termination in the 2010 Regulations.
- 5.1.1. For Market 1, the Authority determined that the cost of termination in Market 1 was R 0.40 per minute.
- 5.1.2. For Market 2, the Authority determined that the cost of termination was R 0.19 and R 0.12 per minute dependent on the market segment in which the call is made.
- 5.2. On review of industry data, the Authority recommends revised rates for Market 1 whilst determining that there is no need to change the existing rates for Market 2
- 5.3. The Authority determines that the cost of termination in Market 1 is now approximately R 0.10 per minute based on, amongst others, the increase in traffic on licensees' networks, where an increase in traffic reduces the cost per unit in the provision of call termination services.
- 5.4. The Authority further determines that this level should be reached in three years. Therefore the proposed revised termination rates over the next three years are:

Table 3: Mobile Termination Rates: 2014-2016

|               | Rand | % Decline |
|---------------|------|-----------|
| 01 March 2013 | 0.40 |           |
| 01 March 2014 | 0.20 | 50%       |
| 01 March 2015 | 0.15 | 25%       |
| 01 March 2016 | 0.10 | 33%       |

Table 4: Proposed fixed line termination rates: 2014-2016

|                        | Between ON | Within ON |
|------------------------|------------|-----------|
| Fixed Termination Rate | R 0.19     | R 0.12    |

- 5.5. The 2010 Regulations also imposed a limited amount of asymmetry available to licensees that met certain criteria, as outlined in Appendix B of the 2010 Regulations.

Table 5: Limitations to Asymmetry as per the 2010 Regulations

|           | Maximum percentage above rate set for identified licensees |
|-----------|--|
| Current   | -  |
| 01-Mar-11 | 20%  |
| 01-Mar-12 | 15%  |
| 01-Mar-13 | 10%  |



5.6. The qualifying criteria for an asymmetric termination rate in 2010 were:

*"1.3. Licensees not listed in Regulation 7(4) (of 2010) may charge higher termination rates based on the following factors:*

*1.3.1. Spectrum allocation. A licensee must justify why it is adversely affected by current spectrum allocation.*

*1.3.2. Economies of scale and scope based on the share of total minutes terminated in the relevant market. A licensee qualifies for an asymmetric rate if it has less than 25 per cent of total terminated minutes in the relevant market as of June 2009.<sup>5</sup>"*

- 5.7. The Authority is of the view that the share of total terminated minutes should be reduced from 25 per cent of total terminated minutes to 20 per cent of total terminated minutes. This amendment is reflected in Appendix A of these draft Regulations.
- 5.8. The Authority is concerned that the markets continue to reflect ineffective competition and that a reduction in termination rates may not be sufficient.
- 5.9. The introduction of asymmetry is a regulatory determination taking into account a number of factors, including:
- 5.9.1. traffic imbalances reflecting economies of scale
  - 5.9.2. promotion of investment
  - 5.9.3. encouraging competition
  - 5.9.4. fostering SMMEs
- 5.10. Given the importance of investment in infrastructure in ensuring the achievement of sufficient scale and the differences in traffic volumes that exist in Market 1, the Authority believes it necessary to sustain and increase asymmetry for a further period of five years.
- 5.11. At the end of this asymmetric period, licensees are to be charging symmetrical termination rates. However, in the interests of fostering small businesses, the Authority proposes that licensees with less than 10% of total terminated minutes in the respective market at the end of this five-year period may retain the asymmetric benefit of the final year.
- 5.12. The table below outlines the asymmetric glide-path of termination rates available to those licensees that meet the qualification criteria:

*Table 6: Maximum asymmetric termination rate which a qualifying licensee may charge for termination in Market 1*

|               | Maximum Rate |
|---------------|--------------|
| 01 March 2014 | R 0.39       |
| 01 March 2015 | R 0.33       |
| 01 March 2016 | R 0.26       |
| 01 March 2017 | R 0.20       |
| 01 March 2018 | R 0.14       |
| 01 March 2019 | R 0.20       |

<sup>5</sup> See "Appendix B: Application of the Fair and Reasonable Obligation" of the 2010 Regulations

*Table 7. Maximum asymmetric termination rate which a qualifying licensee may charge for termination in Market 2*

|               | Between ON | Within ON |
|---------------|------------|-----------|
| 01 March 2014 | 10%        | 10%       |
| 01 March 2015 | 10%        | 10%       |
| 01 March 2016 | 10%        | 10%       |
| 01 March 2017 | 10%        | 10%       |
| 01 March 2018 | 10%        | 10%       |
| 01 March 2019 | 10%        | 10%       |



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**Independent Communications Authority of South Africa**

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E-mail: [pcokie@icasa.org.za](mailto:pcokie@icasa.org.za)

**Our ref: 2/13/7/19 Call Termination**

Mr Graham De Vries  
General Manager: Regulatory Affairs  
MTN (Pty) Ltd  
216 14th Avenue  
Fairland  
2195

**Per email: [devrie\\_g@mtn.co.za](mailto:devrie_g@mtn.co.za)**

Dear Mr de Vries

**RE: Call Termination Market Review Face to Face Meeting Invitation**

1. The Authority released the draft "Call Termination Regulations" and the accompanying Explanatory Note to industry stakeholders on the 4th October 2013 and these have been attached as Annexures 1 and 2.
2. Stakeholders will have 14 days following the publication of the associated Government Gazette to submit written comments on the draft regulations.
3. The Authority intends to hold one-on-one meetings with interested stakeholders during the period 21<sup>st</sup>-25<sup>th</sup> October 2013. The purpose of the meetings is to afford stakeholders the opportunity to seek clarifications on

Dr SS Mncube (Chairperson), NA Batyi, WH Currie, JM Lebooa, MR Mohlaloga, N Ndhlovu, KGS Pillay,  
Dr MM Socikwa, WF Stucke (Councillors), TTC Dlamini (CEO)

A handwritten signature in black ink, appearing to be 'N.A.B.', with a large, stylized flourish above it.

the draft regulations and to make any relevant representations they deem necessary.

4. The Authority requests that you prepare an outline of the implications of the proposed termination regulations on your business in South Africa. Please be prepared to provide supporting evidence to your presentation.
5. Each meeting is scheduled to last for no longer than one hour. If you would like to meet with the Authority, please send your request with a proposed date, time and agenda to: [pcokie@icasa.org.za](mailto:pcokie@icasa.org.za).

**Yours sincerely,**



**Nomvuyiso A. Batyi**

**Councillor**

**Date: 08 / 10 / 2013**






**REPUBLIC OF SOUTH AFRICA  
REPUBLIEK VAN SUID-AFRIKA**

**Vol. 544**

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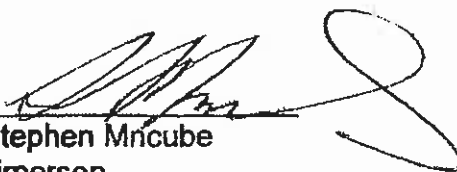
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**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

**"CALL TERMINATION REGULATIONS"  
PURSUANT TO SECTION 67(4) OF THE ELECTRONIC  
COMMUNICATIONS ACT NO. 36 OF 2005**

I, Stephen Mncube, Chairperson of the Independent Communications Authority of South Africa hereby publish the regulations set out in the Schedule in terms of section 4 read with section 67(4) of the Electronic Communications Act No. 36 of 2005.

  
Dr Stephen Mncube  
Chairperson

  
ZB

**SCHEDULE****"CALL TERMINATION REGULATIONS"  
PURSUANT TO SECTION 67(4) OF THE ELECTRONIC  
COMMUNICATIONS ACT NO. 36 OF 2005****1. DEFINITIONS**

In these Regulations, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act or the ICASA Act has the meaning so assigned, and the following words and expressions shall have the meaning set out below:

**"0N"** means a geographic area code as specified in Regulation 6 of the Numbering Plan Regulations;

**"Authority"** means the Independent Communications Authority of South Africa;

**"the Act"** means the Electronic Communications Act, 2005 (Act No. 36 of 2005);

**"ECNS"** means an electronic communications network service as defined in the Act;

**"ECS"** means an electronic communications service as defined in the Act;

**"Fixed voice call termination service"** means a wholesale voice call termination service provided by an ECNS or ECS licensee to a fixed location, and includes such a service provided by a licensee providing call termination using fixed wireless services;

**"ICASA Act"** means the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000);

**"Mobile voice call termination service"** means a wholesale call termination service provided by an ECNS or ECS licensee to mobile subscriber equipment enabled by wireless technology;

**"Reference Interconnection Offer" or "RIO"** means a document, approved by the Authority, setting out the standard terms and conditions for interconnection agreements;

**"Retail service"** means a service offered by an ECS licensee to end-users;

**"SMP"** means significant market power as defined in section 67(5) of the Act;

  
28

**"Wholesale service"** means a service that an ECS or ECNS licensee offers other ECS or ECNS licensees.

## **2. PURPOSE OF REGULATIONS**

The purpose of these Regulations is to: -

- (a) Define and identify the wholesale call termination markets that exist within the borders of the Republic of South Africa;
- (b) Set out the methodology used to determine the effectiveness of competition in such markets;
- (c) Declare licensees that have SMP;
- (d) Set out the pro-competitive measures the Authority imposes to remedy market failure in the relevant markets found to have ineffective competition;
- (e) Set out the schedule for periodic review of the relevant markets and the effectiveness of competition in such markets.

## **3. MARKET DEFINITION**

- (1) The markets in which the Authority intends to impose pro-competitive measures, if such markets are found to have ineffective competition are the markets for mobile and fixed wholesale call termination services in the Republic.
- (2) These markets are categorised according to the type of service provided to the end-user and are defined as follows:
  - (a) Market 1: The market for wholesale voice call termination services to a mobile location on the network of each licensee who offers such a service within the Republic.
  - (b) Market 2: The market for wholesale voice call termination services to a fixed location on the network of each licensee who offers such a service within the Republic, consisting of:
    - i. The market segment for wholesale voice call termination to a fixed location within an 0N geographic area code; and
    - ii. The market segment for wholesale voice call termination to a fixed location between 0N geographic area codes.



#### 4. METHODOLOGY

In determining the effectiveness of competition in the wholesale voice call termination markets, the Authority has applied the following methodology:

- (a) the identification of relevant markets and their definition according to the principles of the Hypothetical Monopolist Test, taking into account the non-transitory (structural, legal, or regulatory) entry barriers to the relevant markets and the dynamic character and functioning of the relevant markets;
- (b) the assessment of licensees' market shares in the relevant markets; and
- (c) the assessment on a forward-looking basis of the level of competition and market power in the relevant markets.

#### 5. EFFECTIVENESS OF COMPETITION

Pursuant to regulation 4, the Authority has determined that competition in the wholesale voice call termination markets, as defined in regulation 3, is ineffective.

#### 6. SMP DETERMINATION


The Authority determines that every licensee that offers wholesale voice call termination services has SMP in its own market.

#### 7. PRO-COMPETITIVE TERMS AND CONDITIONS

- (1) The Authority has identified the following market failures in the respective wholesale voice call termination markets:
  - (a) a lack of the provision of access
  - (b) the potential for discrimination between licensees offering similar services
  - (c) a lack of transparency
  - (d) inefficient pricing
- (2) All licensees must comply with the following pro-competitive terms and conditions to overcome the market failures identified in regulation 7(1):



- (a) Compliance with the provisions of the Interconnection Regulations (Government Gazette No. 33101 of 2010)
  - (b) Compliance with the Compliance Manual Regulations to be prescribed by the Authority.
  - (c) Charge fair and reasonable prices for wholesale voice call termination consistent with Appendix B
- (3) The Authority has determined that additional pro-competitive terms and conditions are necessary to correct the market failures identified in regulation 7(1), which are to be imposed on the following licensees:
- (a) Licensees that have historically benefitted from the allocation of more efficient lower band spectrum.;
  - (b) Licensees that benefit from economies of scale and scope in maintaining a share of total minutes terminated in the respective markets of greater than 25 per cent as of June 2009.
- (4) The Authority determines that the following licensees have these characteristics:
- (a) Market 1:
    - i. MTN
    - ii. Vodacom
  - (b) Market 2:
    - i. Telkom
- (5) All licensees referred in regulation 7(4) of these regulations must comply with the following additional pro-competitive terms and conditions
- (a) Publication of a Reference Interconnection Offer (RIO)
    - i. Licensees identified in regulation 7(4) must submit a RIO to the Authority for approval within forty five (45) days of promulgation of these Regulations.
    - ii. The RIO must comply with the requirements set out in Appendix A.
    - iii. The Authority will assess a RIO submitted by a licensee within thirty (30) days of its submission.
    - iv. Where the Authority determines that a RIO submitted by a licensee is not consistent with these regulations, the Authority will direct the licensee to amend the relevant terms



- and conditions of the RIO within a period determined by the Authority which period must not exceed thirty (30) days.
- v. If a licensee receives no written communication from the Authority regarding the assessment of its RIO within the thirty (30) day period stipulated in regulation 7(5)(a)(v), the RIO is deemed to be approved.
  - vi. The RIO will become effective upon approval by the Authority.
  - vii. Provided that all requirements in the RIO are met by both an interconnection seeker and provider, a request for interconnection based on the RIO must be concluded within fifteen (15) days of such a request for interconnection unless otherwise agreed between the licensees.
  - viii. A licensee identified in Regulation 7(4) must publish the approved version of its RIO on its website within five (5) days of receiving notice of approval from the Authority.

**(b) Price Control: Cost oriented pricing**

- i. For the period 01 March 2011 to 01 March 2014, any licensee identified in Regulation 7(4)(a) must charge the wholesale voice call termination rates to a mobile location as specified in Table 1:

**Table 1: Wholesale voice call termination rates to a mobile location (Market 1)**

|                  | <b>Peak</b>   | <b>Off-peak</b> |
|------------------|---------------|-----------------|
| 01-Mar-11        | R 0.73        | R 0.65          |
| 01-Mar-12        | R 0.56        | R 0.52          |
| <b>01-Mar-13</b> | <b>R 0.40</b> | <b>R 0.40</b>   |

- ii. For the period 01 March 2011 to 01 March 2014, any licensee identified in Regulation 7(4)(b) must charge the wholesale voice call termination rates to a fixed location as specified in Table 2:

**Table 2: Wholesale voice call termination rates to a fixed location (Market 2)**

|                  | <b>Within ON area code</b> |                 | <b>Between ON area code</b> |                 |
|------------------|----------------------------|-----------------|-----------------------------|-----------------|
|                  | <b>Peak</b>                | <b>Off-peak</b> | <b>Peak</b>                 | <b>Off-peak</b> |
| 01-Mar-11        | R 0.20                     | R 0.12          | R 0.28                      | R 0.19          |
| 01-Mar-12        | R 0.15                     | R 0.12          | R 0.25                      | R 0.19          |
| <b>01-Mar-13</b> | <b>R 0.12</b>              | <b>R 0.12</b>   | <b>R 0.19</b>               | <b>R 0.19</b>   |





(c) Accounting Separation and Cost Accounting

- i. Licensees identified in regulation 7(4) must submit regulatory financial reports in line with the format prescribed in the Accounting Separation and Cost Accounting regulations to be prescribed by the Authority.

**8. SCHEDULE FOR REVIEW OF MARKETS**

The Authority will review the wholesale voice call termination markets to which these regulations apply, as well as the effectiveness of competition and the application of pro-competitive measures in those markets, after a minimum period of three (3) years from the publication of these regulations.

**9. CONTRAVENTIONS AND PENALTIES**

- (1) A licensee which fails to comply with regulation 7(2)(c) is liable to a fine of Two Hundred Thousand Rand (R 200 000.00);
- (2) A licensee which fails to comply with regulation 7(5)(a) is liable to a fine of up to Five Hundred Thousand Rand (R 500 000.000);
- (3) A licensee which fails to comply with regulation 7(5)(b) is liable to a fine of up to Five Hundred Thousand Rand (R 500 000.00);
- (4) A licensee which contravenes all regulations not specified in regulations 9(1) and (2) is liable to a fine of not more than Two Hundred Thousand Rand (R 200 000.00).

**10. SHORT TITLE AND COMMENCEMENT**

These regulations are called the "Call Termination Regulations, 2010/11" and will become effective upon the date of publication.



## **Appendix A: Minimum content of a Reference Interconnection Offer**

The RIO that must be submitted to the Authority by the licensees listed in Regulation 7(4) must, among other things, include the following:

### **1.1. General Legal Principles**

- Definitions of terms and abbreviations
- Requirements concerning the exchange and use of information for the purpose of interconnection; and
- Data exchange formats.

### **1.2. Initiating Negotiations and Proposing Amendments**


- Procedure for initiating negotiations as well as that for amending interconnection agreements, including:
  - how a request for interconnection is to be made;
  - to whom a request for interconnection is to be sent; and
  - the information that needs to be included in the application.

### **1.3. Description of Interconnection Services to be provided**

- List of interconnection services offered;
- Full description of each interconnection service; and
- Conditions governing access to services.

### **1.4. Schedule of Charges for Interconnection Services**

- Commercial and financial matters, including billing and collection procedures, and payment terms and conditions;
- The full charge for each interconnection service. Where relevant charges should:
  - be broken down into or built up from the charges for the network components;
  - include an indication of any surcharges;
  - include an indication of charging unit/s (e.g. per second);
- Mechanisms for the review of charges; and
- Billing services for third parties, where relevant (e.g. if operator is billing on behalf of resellers, other ECS or other ECNS).



**1.5. Technical Characteristics**

- Comprehensive technical description of the interconnect interface(s), including the signalling protocol(s) used;
- Full details of the availability and location of points of interconnection;
- Description of the physical arrangements for interconnection;
- Description of traffic routing arrangements;
- Details regarding access to numbers by the parties
- Requirements to ensure network security or integrity;
- The quality availability, security, efficiency, and synchronization of the services provided.

**1.6. Arrangements for the Establishment of Interconnection**

- Conditions governing service provision;
- Traffic forecasting requirements and arrangements;
- Arrangements for testing the operation of interfaces and the interoperability of services;
- Fault management procedures (recording and clearing); and
- Conditions governing bank guarantees.

**1.7. Other Legal and Procedural Issues**

- Provisions on procedures for review, termination, and amendment of interconnection agreements;
- Limitation of liability and indemnity between licensees;
- Penalty clauses; and
- Dispute resolution arrangements and procedures, including the right of either party to request the Authority to intervene to resolve a dispute.



## **Appendix B: APPLICATION OF THE FAIR AND REASONABLE OBLIGATION**

### **1. PRINCIPLES OF IMPLEMENTATION OF FAIR AND REASONABLE OBLIGATION**

- 1.1. For the purposes of regulation 7(2)(c), "fair and reasonable" prices are rates that are equivalent to the cost-oriented rates imposed on the licensees identified in Regulation 7(5)(b).
- 1.2. Licensees must charge the following rates:
  - 1.2.1. Reciprocal rates with the rate set for MTN and Vodacom if these licensees are in Market 1;
  - 1.2.2. Reciprocal rates with the rate set for Telkom if these licensees are in Market 2.
- 1.3. Licensees not listed in Regulation 7(4) may charge higher termination rates based on the following factors:
  - 1.3.1. Spectrum allocation. A licensee must justify why it is adversely affected by current spectrum allocation.
  - 1.3.2. Economies of scale and scope based on the share of total minutes terminated in the relevant market. A licensee qualifies for an asymmetric rate if it has less than 25 per cent of total terminated minutes in the relevant market as of June 2009.
- 1.4. A licensee may qualify for an asymmetric rate if either or both factors are applicable.

### **2. LIMITATIONS TO ASYMMETRIC RATE A LICENSEE MAY CHARGE**

A licensee who qualifies for an asymmetric rate under paragraph 1.3 of this Annexure may charge a maximum percentage above the cost-oriented rate set in regulation 7(5)(b) according to the following table:

|           | Maximum percentage above rate set for identified licensees |
|-----------|--|
| Current   | -  |
| 01-Mar-11 | 20%  |
| 01-Mar-12 | 15%  |
| 01-Mar-13 | 10%  |



ICASA Wholesale Call Termination Market Review for the period 2010-2013

## **ICASA Wholesale Call Termination Market Review for the period 2010-2013**

### **Explanatory Note for the draft Call Termination Regulations**

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## ICASA Wholesale Call Termination Market Review for the period 2010-2013

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**List of Abbreviations**

|           |   |
|-----------|---|
| Authority | The Independent Communications Authority of South Africa  |
| ECA       | Electronic Communications Act No. 36 of 2005  |
| ECNS      | Electronic Communications Network Service   |
| ECS       | Electronic Communications Service   |
| RIO       | Reference Interconnection Offer   |
| VOIP      | Voice Over Internet Protocol  |
| SS7       | Signalling Protocol 7 as defined by ITU Recommendations   |
| SIP       | Session Initiation Protocol as defined by the ITU or any other recognised standards body where no ITU standard is in place.   |
| TDM       | Time Division Multiplex as defined by ITU Recommendations or any other recognised standards body where no ITU standard is in place                                    |
| ON        | Geographic area code as specified in Regulation 6 of the Numbering Plan Regulations in terms of the Telecommunications Act, 1996 (GG No. 28839, 15 May 2006: page: 9) |
| ONN       | The three-digit geographic area code that imposes specific locational significance to a number.   |

## **1. Executive Summary**

### **1.1 Definition of the relevant market**

1. The Authority determines that wholesale voice call termination services may be defined as existing within two markets:
  - a. **Market 1:** The market for wholesale voice call termination services to a mobile location on the network of each licensee who offers such a service within the Republic of South Africa.
  - b. **Market 2:** The market for wholesale voice call termination services to a fixed location on the network of each licensee who offers such a service within the Republic of South Africa, consisting of:
    - i. The market segment for wholesale voice call termination to a fixed location within an ON geographic area code; and
    - ii. The market segment for wholesale voice call termination to a fixed location between ON geographic area codes.

### **1.2 Effectiveness of competition in the relevant markets**

1. The Authority put forward its provisional conclusion regarding the evaluation of the effectiveness of competition in the relevant markets in Section 2.4 of the Explanatory Note to the draft Call Termination Regulations (GG 33121, page 67).<sup>1</sup>
2. No evidence has been submitted to persuade the Authority that competition in either market for the provision of wholesale voice call termination services is effective.

### **1.3 Pro-competitive terms and conditions**

1. The Authority identified the following market failures within the wholesale call termination markets:
  - a. a lack of the provision of access
  - b. the potential for discrimination between licensees offering similar services
  - c. a lack of transparency
  - d. inefficient pricing
2. The Authority has identified the following pro-competitive terms and conditions to be imposed on all licensees to rectify the above market failures:
  - a. Compliance with the provisions of the Interconnection Regulations (Government Gazette No. 33101 of 2010) (Regulation 7(2))
  - b. Compliance with the Compliance Manual Regulations to be prescribed by the Authority (Regulation 7(2)),
  - c. Charge fair and reasonable prices for wholesale voice call termination consistent with Appendix B ((Regulation 7(2)).
3. Additional pro-competitive terms and conditions to rectify the above market failures are imposed on those licensees with the following characteristics:
  - a. Licensees that have historically benefitted from the allocation of more efficient lower band spectrum by the Authority;
  - b. Licensees that benefit from economies of scale and scope in maintaining a share of total minutes terminated in the respective markets of greater than 25 per cent as of June 2009.

<sup>1</sup> The draft Call Termination Regulations and the Explanatory Note thereto, as released in GG 33121 on 16 April 2010, are referred to as "GG33121" throughout the remainder of this document.



4. The Authority determines that the following licensees are to comply with the additional pro-competitive terms and conditions:
  - a. Market 1 (Regulation 7(4)(a)):
    - i. Vodacom
    - ii. MTN
  - b. Market 2 (Regulation 7(4)(b)):
    - i. Telkom
5. The additional pro-competitive terms and conditions to rectify the identified market failures are:
  - a. Obligation to develop a reference Interconnection offer to facilitate enhanced access and transparency and therefore support Object 2(b) of the ECA which is to facilitate interoperable networks (Regulation 7(5)(a)).
  - b. Obligation to charge cost-oriented prices to overcome the market failure of inefficient pricing (Regulation 7(5)(b)):
    - i. Market 1:

**Table 1: Wholesale voice call termination rates to a mobile location (Market 1)**

|               | Peak   | % adjustment | Off-peak | % adjustment |
|---------------|--------|--------------|----------|--------------|
| Current rates | R 0.89 |              | R 0.77   |              |
| 01-Mar-11     | R 0.73 | -18%         | R 0.65   | -16%         |
| 01-Mar-12     | R 0.56 | -23%         | R 0.52   | -20%         |
| 01-Mar-13     | R 0.40 | -29%         | R 0.40   | -23%         |

ii. Market 2:

**Table 2: Wholesale voice call termination rates to a fixed location (Market 2)**

|           | Within ON geographic area code |       |          |       | Between ON geographic area code |       |          |       |
|-----------|--------------------------------|-------|----------|-------|---------------------------------|-------|----------|-------|
|           | Peak                           | % adj | Off-peak | % adj | Peak                            | % adj | Off-peak | % adj |
| Current   | R 0.23                         |       | R 0.12   |       | R 0.33                          |       | R 0.19   |       |
| 01-Mar-11 | R 0.20                         | -13%  | R 0.12   | 0%    | R 0.28                          | -15%  | R 0.19   | 0%    |
| 01-Mar-12 | R 0.15                         | -25%  | R 0.12   | 0%    | R 0.25                          | -11%  | R 0.19   | 0%    |
| 01-Mar-13 | R 0.12                         | -20%  | R 0.12   | 0%    | R 0.19                          | -24%  | R 0.19   | 0%    |

- c. Obligation to comply with Accounting separation and Cost Accounting regulations to be prescribed by the Authority (Regulation 7(5)(c)).
6. All other licensees may charge an asymmetric (higher) termination rate subject to certain conditions. Licensees that do satisfy the set criteria cumulatively may charge an asymmetric rate subject to the table below (see Appendix B):

**Table 3: Maximum asymmetric (higher) termination rate a qualifying licensee may charge**

|           | Maximum percentage above rate set for licensees specified in Regulation 7(4) |
|-----------|--|
| Current   | -  |
| 01-Mar-11 | 20%  |
| 01-Mar-12 | 15%  |
| 01-Mar-13 | 10%  |



## 1.4 Conclusions

The Authority expects the imposition of pro-competitive terms and conditions on Markets 1 and 2 to achieve the following:

- a. A more efficient and effective access regime;
- b. A more dynamic retail pricing environment;
- c. Continued access and investment in electronic communications networks in South Africa.



## 2. Amendments to the draft Call Termination Regulations as released in GG 33121

### 2.1 Introduction

1. On review of the written, oral and further submissions in respect of GG 33121, the Authority identified the following concerns that required attention:
  - The definition of "fixed call termination"
  - The definition of the relevant market for wholesale call termination
  - Within and Between ON points of interconnection and retail tariffs
  - Evaluation of the effectiveness of competition
  - Identification of proportionate pro-competitive terms and conditions
  - Design of the proposed price control
  - Reference Interconnect Offer
  - Convergence
2. This section provides the Authority's rationale for any amendments made to the draft Call Termination Regulations as released in GG 33121.

### 2.2 Definition of the market for wholesale voice call termination in South Africa

This section reviews the following:

- The definition of fixed call termination
- The definition of the market for termination:
  - to a mobile location
  - to a fixed location

#### 2.2.1 The definition of fixed call termination service

1. The Authority put forward the following definition for fixed call termination:

*"Fixed call termination" means a wholesale call termination service provided by an electronic communications network services or electronic communications services licensee to a fixed location, and includes licensees providing call termination using VoIP to a fixed location and fixed wireless services (Page 5, GG 33121)*
2. A number of licensees raised concerns regarding the inclusion of VoIP services in the definition for "fixed call termination," including Smile Telecoms, Telkom, ISPA and Vox Telecoms.
3. The queries revolved around the inclusion of a specific technology (VoIP) in the definition of a service when that technology could be used to provide both fixed location and mobile location services.
4. The concern regarding reference to a specific technology is noted.
5. The Authority also notes Telkom's query regarding the possible differentiation between fixed (wireline) location services and fixed (wireless/nomadic) services.
6. In practice, the Authority determines that the differentiating feature is whether it is possible for the end-user to maintain an active session, i.e. a voice call during a change in location.
7. Taking the above into account, the Authority amends the definition of fixed call termination service to the following:

*"Fixed voice call termination" means a wholesale voice call termination service provided by an electronic communications network services or electronic communications services licensee to a fixed location, and includes licensees providing termination using fixed wireless services.*



### 2.2.2 Definition of the market for wholesale voice call termination

1. Regulation 3 of the draft Call Termination regulations defined the market as follows:

"separate wholesale call termination markets on each electronic communications network and electronic communications service licensee in South Africa" (Regulation 3, page 6, GG 33121).
2. The Authority gave more detail on the interpretation of this definition in the explanatory note accompanying the regulations:

"For the avoidance of doubt, the Authority notes that all licensees that provide wholesale call termination services are included in this market definition. This includes licensees that provide Voice over Internet Protocol (VoIP) services as well as Class ECNS/ECS licensees" (page 48, GG 33121).
3. Stakeholders raised a number of queries regarding the accuracy of the definition given the manner in which call termination services are provided.
4. These queries included concerns as to whether:
  - a. termination to a fixed location is in the same market as termination to a mobile location (Telkom);
  - b. other termination services, such as SMS and MMS services are, included in the definition of the market (MTN);
  - c. the market for termination to a fixed location is too broad, owing to the potential for four wholesale markets existing within the proposed market definition (see pages 5-24 of Neotel's written submission);
  - d. the possible existence of different termination rates to different services, particularly Value Added Services (point 46 of ISPA's written submission).
5. The Authority responds to these queries below.



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### 2.2.3 The definition of the market for wholesale voice termination to a fixed location

1. The Authority notes that, in practice, interconnection between two licensees providing termination to a fixed location is characterised by the opportunity for both near-end and far-end handover, whilst interconnection between any licensee and a licensee providing wholesale voice call termination to a mobile location is characterised by near-end handover.
2. The ability to choose between near-end and far-end handover in the provision of wholesale voice call termination services to a fixed location and the importance of this differentiation in fostering infrastructure competition therefore leads to the need for a review of the initial definition as proposed in GG 33121.
3. The product nature of each market segment is the same in that a termination service to a fixed location is provided.
4. However, the geographic boundaries of each segment are different. The geographic boundary for the market for Between Billing Zone (BBZ) wholesale voice call termination to a fixed location is that geographic area outside the geographic area/province code from which a voice call is originated but within the boundaries of the Republic of South Africa, i.e. between the ON geographic area/province codes of the numbering plan.
5. The geographic boundary for the market for Within Billing Zone (WBZ) wholesale voice call termination to a fixed location is that of the defined boundary within the ON geographic area/province codes of the numbering plan.
6. The Authority determines that the definition of the market for wholesale voice call termination to a fixed location consists of two market segments as defined below:
  - a. The market segment for wholesale voice call termination to a fixed location within the ON geographic area code of the numbering plan; and
  - b. The market segment for wholesale voice call termination to a fixed location between ON geographic area codes of the numbering plan.

### 2.2.4 Conclusion on the definition of the market

1. The Authority determines that the product and geographic definition of the market for wholesale voice call termination services is dependent on the characteristics of the service as well as the manner in which the service may be provided.
2. The geographic boundary of the market differs based on cost causation and the ability and choice to apply either near-end and/or far-end handover.
3. Therefore, the Authority determines the following definitions of the market and market segments for the provision of wholesale voice call termination services in South Africa:
  - a. Market 1: The market for wholesale voice call termination services to a mobile location on the network of each licensee which offers such a service within the Republic of South Africa.
  - b. Market 2: The market for wholesale voice call termination services to a fixed location on the network of each licensee which offers such a service within the Republic of South Africa, consisting of:
    - i. The market segment for wholesale voice call termination to a fixed location within the ON geographic area code; and
    - ii. The market segment for wholesale voice call termination to a fixed location between ON geographic area codes.



## **2.3 Evaluation of the effectiveness of competition**

1. The Authority put forward its provisional conclusion regarding the evaluation of the effectiveness of competition in the relevant markets in Section 2.4 of GG 33121 (page 67).
2. No evidence has been submitted to persuade the Authority that the market for the provision of wholesale voice call termination services in either market is competitive.

## **2.4 Imposition of pro-competitive terms and conditions**

This section outlines the Authority's response to the following matters:

- Imposition of pro-competitive terms and conditions in a proportionate manner
- The design of the price control
- The construction and contents of a Reference Interconnection Offer
- Monitoring reports.

### **2.4.1 Imposition of pro-competitive terms and conditions in a proportionate manner**

1. The Authority outlined its approach to the Imposition of pro-competitive terms and conditions to remove any existing market failures, stating that "specific obligations imposed must be based on the nature of the problem identified, and must be proportionate and justified" (page 73 of GG 33121).
2. The Authority stated that the following pro-competitive terms and conditions might to be imposed:
  - a. Pro-competitive terms and conditions to be Imposed on all licensees in the wholesale call termination market:
    - i. Access, transparency and non-discrimination obligations: These obligations already form part of the regulatory regime for all licensees under Section 37 of the ECA (Regulation 7 and Section 3.4.3.2 of GG 33121)
    - ii. Obligation to maintain and submit reports to the Authority (Regulation 11 and Section 3.5.2 of GG 33121)
    - iii. An obligation to charge fair and reasonable prices (Regulation 8(2) and page 79 of GG 33121).
  - b. Pro-competitive terms and conditions to be imposed on those licensees with "Established Significant Market Power" (Regulation 6(2) of GG 33121)
    - i. Obligation to publish a reference interconnection offer (Regulation 8 and page 77 of GG 33121)
    - ii. A specific price control obligation (Regulation 9(1) and page 78 of GG 33121),
    - iii. Accounting separation and cost accounting obligation (Regulation 10 and page 83 of GG 33121).
3. The Authority proposed these pro-competitive terms and conditions based on the need to correct the following identified market failures:
  - a. a lack of the provision of access
  - b. the potential for discrimination between licensees offering similar services
  - c. a lack of transparency
  - d. inefficient pricing



4. The Authority notes the concerns raised regarding the use of the terminology "Established Significant Market Power" as well as the request for greater clarity on how compliance with specific remedies is to be linked with overcoming the identified market failures.
5. The Authority has amended its criteria for the classification of licensees for the imposition of pro-competitive terms and conditions according to specific behavioural and structural characteristics of licensees.
6. The Authority determines that additional pro-competitive terms and conditions are to be imposed on those licensees that, from an ex ante approach, have countervailing bargaining power<sup>2</sup>, and therefore maintain the greatest potential to leverage off the identified market failures. The Authority has determined that licensees with the following characteristics are likely to be able to act in such a way:
  - a. Licensees that have historically benefitted from the allocation of more efficient lower band spectrum by the Authority;
  - b. Licensees that benefit from economies of scale and scope in maintaining a share of total minutes terminated in the respective market of greater than 25 per cent as of June 2009 (see Tables 2.3 and 2.4 of GG 33121 on pages 55 and 56 respectively).
7. Vertical integration is not deemed to be a category for qualification for asymmetric regulation because of the non-discrimination requirements of sections 37(6) and 43(7) of the ECA, which refer to interconnection and facilities leasing services.
8. Only those licensees declared to benefit from the above characteristics are to face additional pro-competitive terms and conditions that are necessary to correct the identified market failure.
9. The following licensees are to comply with additional pro-competitive terms and conditions in relation to Market 1:
  - a. **Vodacom:** Vodacom has historically benefitted from the allocation of more efficient lower band spectrum and has maintained a share of total minutes terminated in Market 1 of greater than 25 per cent as of June 2009. These characteristics afford Vodacom sufficient countervailing bargaining power to influence termination rates in other markets.
  - b. **MTN:** MTN has historically benefitted from the allocation of more efficient lower band spectrum and has maintained a share of total minutes terminated in Market 1 of greater than 25 per cent as of June 2009. These characteristics afford MTN sufficient countervailing bargaining power to influence termination rates in other markets.
10. The following licensee is to comply with additional pro-competitive terms and conditions in relation to Market 2:
  - a. **Telkom:** Telkom has benefitted from preferential access to spectrum owing to its historical ownership structure and has maintained a share of total minutes terminated in Market 2 of greater than 25 per cent as of June 2009. These characteristics afford Telkom sufficient countervailing bargaining power to influence termination rates in other markets.

#### 2.4.2 The design of a price control

1. The Authority re-iterates its position that the provision of wholesale voice call termination services, irrespective of location, is a bottleneck service, allowing a licensee

<sup>2</sup> Countervailing bargaining power exists when a particular purchaser (or purchaser group) of a product is sufficiently important to its supplier to influence the price charged for that product.



*"to set the price for call termination above competitive levels"*<sup>3</sup>.

2. The objective of the imposition of a price control for the provision of wholesale voice call termination services remains as stated in GG 33121:

*"The Authority seeks to ensure that prices and margins are reduced to a level that covers the cost of efficiently incurred capital, as would be the case in a competitive market."*<sup>4</sup>

3. The following factors affect the design of a price control to compensate for the lack of effective competition:
- a. Non-discrimination: In upholding the non-discrimination principle of section 37(6) of the ECA as well as Regulation 10 of the Interconnection Regulations (GG 33101),<sup>5</sup> a licensee is to charge wholesale voice call termination rates based on the cost incurred to terminate a voice call on its network irrespective of whether the source of the traffic stems from a mobile or fixed location.
  - b. A flat versus peak/off-peak differential for termination rates:
    - i. The Authority put forward its view that wholesale voice call termination should be charged at one rate, irrespective of time (Page 92 of GG 33121).
    - ii. Cell C supported this approach, whilst MTN, Telkom and Vodacom disputed the imposition of a single rate for wholesale voice call termination.
    - iii. The Authority's view is that an efficient network should be dimensioned based on the maximum traffic expected at any given time. Furthermore, in one-on-one meetings with licensees it was acknowledged that the peak/off-peak termination rate structure has little impact on the nature of calling patterns of end-users. End-user calling patterns are dictated by socio-economic and cultural factors. The retail pricing strategies of licensees seek to exploit these characteristics by introducing packages to stimulate increased traffic, for example, over weekends.
    - iv. The Authority maintains its view that wholesale voice call termination services are to be charged at one rate and that flexibility in the management of traffic may be achieved through the pricing of services in the retail market.
    - v. For purposes of call termination, peak calling hours are defined as calling hours from Monday to Friday 07H00 to 20H00.
    - vi. Off peak call hours are defined as all hours other than the peak rate group hours.

#### 2.4.3 The design of a glide-path towards the efficient level for Market 1

1. MTN, Vodacom and Cell C all voiced the following concerns:
- a. Interconnection must be financially and economically feasible as per section 37(3)(a) of the ECA;
  - b. The implementation of the rate cut should be deferred to 1 March 2011;
  - c. The degree of change per year should be smoothed out to reduce substantial shocks to the industry;
  - d. Inflation should be considered when implementing a price control.

<sup>3</sup> Page 57 of the Explanatory Note to the Draft Call Termination Regulations, GG 33121

<sup>4</sup> Page 51 of the Explanatory Note to the Draft Call Termination Regulations, GG 33121

<sup>5</sup> GG 33252, 31 May 2010



2. Furthermore, MTN and Vodacom requested that if the Authority is to maintain its position on a single rate, that the rate be introduced over time to minimise any shocks to existing business models (page 22 and 7 of written submissions respectively).
3. The Authority acknowledges that a change in the wholesale pricing regime from a two-tier to a single-tier termination rate regime may have an impact on the business structure of all licensees, including those involved in independent downstream retail services.
4. Regarding inflation, the Authority expects licensees to compensate for reasonable inflationary pressures through internal efficiency gains. The Authority determines that reasonable inflationary pressures are inflationary pressures within the inflation target band of 3-6 per cent as set by the South African Reserve Bank.
5. The Authority will consider amending the termination rate to be charged in March 2014, should the Consumer Price Index reflect an increase in inflation above the inflation target band.
6. The Authority has determined that it is necessary to minimise the shock of a reduction in termination rates to provide adequate time for licensees and their re-sellers to review their distribution agreements.
7. Therefore the Authority determines the following termination rate glide path applicable to those licensees identified in Regulation 7(5)(b)(i):

**Table 4: Wholesale voice call termination rates to a mobile location (Market 1)**

|               | Peak   | % adjustment | Off-peak | % adjustment |
|---------------|--------|--------------|----------|--------------|
| Current rates | R 0.89 |              | R 0.77   |              |
| 01-Mar-11     | R 0.73 | -18%         | R 0.65   | -16%         |
| 01-Mar-12     | R 0.56 | -23%         | R 0.52   | -20%         |
| 01-Mar-13     | R 0.40 | -29%         | R 0.40   | -23%         |

8. The intention is for the Authority to review the above rates for amendment after 01 March 2014.

#### **2.4.4 The design of a glide-path towards the efficient level for Market 2**

1. The Authority proposed that the cost of termination on Telkom's network should be R 0.10 (Regulation 9(1)(b) of GG 33121).
2. Telkom disputed the proposed R 0.10 rate in its written submission, stating the following: "FTR should be set at ZAR 0.37 and adjusted over time in line with changes to the costs of the access deficit" (page 64 of the Telkom submission to the draft regulations).
3. Telkom proposed this figure based largely on the existence of an access line deficit, in part created by universal service obligations (listed on page 60 of the Telkom submission).
4. The ITU and the European Commission have stated the following regarding the inclusion of access line costs in the derivation of a cost-oriented rate for interconnection:

*"[Access] lines are considered as customer dedicated, therefore, all related expenses should be recovered either by rental, one-off purchase, or other arrangements that would not impact the cost of interconnection on the core network" (ITU, 2003, page 2)<sup>6</sup>*

and

<sup>6</sup> ITU document reference: GR TAL – C 3 – E, [www.itu.int/itudoc/itu-t/tal/cost-od/B4386\\_wv9.doc](http://www.itu.int/itudoc/itu-t/tal/cost-od/B4386_wv9.doc)



*"since the provision of interconnection does not lead to any increase of costs in the dedicated components of the local loop of the terminating network, the calculation of interconnection charges should not include any component relating to the direct cost of the subscriber-dedicated components of the local loop" (Commission recommendation 98/195/EC, page 73/46).*

5. The World Bank<sup>7</sup> has stated the following regarding the provision of interconnection services:

*"Considering the example of interconnection services, it is important to underscore the following three conclusions:*

- The provision of interconnection services does not modify the retail sales service, as the latter only concerns sales to final subscribers.*
- The provision of interconnection services does not modify the access service, as the capacity implemented and its maintenance do not have to be adjusted to bear the flow of this additional traffic.*
- In contrast, transport services are affected by the traffic resulting from interconnection services.*

*As a result, the cost of access services must be covered by retail service revenues. Unless these services rates are rebalanced, there are risks for anticompetitive practices and cream skimming. In other words, market deregulation imposes a certain cost orientation for dominant operators' tariffs, and, consequently, implies a price restructuring that eliminates the largest existing pricing averaging."*

6. This is consistent with the allocation of costs as specified in volume 3 of the Chart of Accounts and Cost Allocation Manual (GG 23632).

7. The Authority therefore determines the following:

- a. Universal service obligations<sup>8</sup> are not to form part of a determination on termination rates for commercial services. These matters are dealt with through separate regulatory processes.
- b. Access costs are to be borne by the consumer.
- c. Licensees have the freedom to adjust any retail tariffs.

8. Taking into account the revised definition of the market for termination to a fixed location, whilst including an incentive for investment in fixed location infrastructure, the Authority imposes the following termination rates to a fixed location to be levied by those licensees listed in Regulation 7(5)(b)(ii):

**Table 5: Wholesale voice call termination rates to a fixed location (Market 2)**

|           | Within ON geographic area code |       |          |       | Between ON geographic area code |       |          |       |
|-----------|--------------------------------|-------|----------|-------|---------------------------------|-------|----------|-------|
|           | Peak                           | % adj | Off-peak | % adj | Peak                            | % adj | Off-peak | % adj |
| Current   | R 0.23                         |       | R 0.12   |       | R 0.33                          |       | R 0.19   |       |
| 01-Mar-11 | R 0.20                         | -13%  | R 0.12   | 0%    | R 0.28                          | -15%  | R 0.19   | 0%    |
| 01-Mar-12 | R 0.15                         | -25%  | R 0.12   | 0%    | R 0.25                          | -11%  | R 0.19   | 0%    |
| 01-Mar-13 | R 0.12                         | -20%  | R 0.12   | 0%    | R 0.19                          | -24%  | R 0.19   | 0%    |

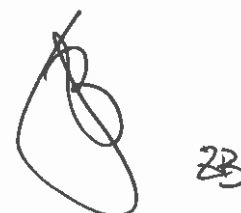
<sup>7</sup> See page 24 of "A Model for calculating Interconnection Costs in Telecommunications" 2004. Available at: [http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2004/03/04/000090341\\_20040304155451/Rendered/PDF/280390.PAPER0Model0for0calculating0costs.pdf](http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2004/03/04/000090341_20040304155451/Rendered/PDF/280390.PAPER0Model0for0calculating0costs.pdf)

<sup>8</sup> Including termination rates to community service telephones

9. The Authority is of the view that the above rates provide for an investment incentive to support further network investment by new entrants as well as provide adequate revenue generation for existing licensees to retain and maintain investments.
10. The intention is for the Authority to review the above rates for amendment after 01 March 2014.

#### **2.4.5 Fair and reasonable rates, symmetry and the case for asymmetry**

1. The objective of regulating specific voice call termination rates is to ensure that these rates are set at an "efficient level" (GG 33121: 69).
2. The Authority indicated its preference for symmetrical prices for similar services in GG 33121 and reiterates its position here.
3. However, the Authority notes international arguments both for and against asymmetry as well as those points raised during the public consultation process.
4. The Authority determines that the application of asymmetric rates for a transitory period will benefit total social welfare by stimulating increased competition in the respective markets, thereby benefiting end-users.
5. However, asymmetric (higher) termination rates may only be justified on certain criteria to ensure that only those licensees that are dedicated to the goal of reducing retail prices through competitive forces qualify for such asymmetry.
6. Therefore the Authority has determined that the following criteria apply when a licensee considers whether it may qualify for an asymmetric rate:
  - a. Spectrum allocation: The allocation of spectrum is a factor controlled by the Regulator, not the licensee. The Authority determines that licensees who are able to quantitatively show a prejudiced impact on cost based on the allocation of spectrum may qualify for an asymmetric (higher) termination rate.
  - b. Economies of scale and scope: The Authority determines that a licensee may choose to apply an asymmetric rate under the following conditions:
    - i. The licensee is an I-ECS licence holder with a share of total minutes terminated in the respective market of less than 25 per cent as of June 2009 (see Tables 2.3 and 2.4 of GG 33121 on pages 55 and 56 respectively);
    - ii. All I-ECS licensees who lease electronic communications facilities are bound by the principle of non-discrimination in Regulation 10(3) of the Interconnection Regulations and Regulation 9(3) of the Electronic Communications Facilities Leasing Regulations.
7. A licensee may qualify for an asymmetric rate if either or both factors are applicable..
8. The Authority determines that it is necessary to limit and reduce the amount of asymmetry a qualifying licensee may charge, to ensure that investment by new entrants is efficient.

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9. The Authority therefore imposes the following limits which a qualifying licensee may charge:

**Table 6: Maximum asymmetric (higher) termination rate a qualifying licensee may charge**

|           | Maximum percentage above rate set for licensees specified in Regulation 7(2) |
|-----------|--|
| Current   | -  |
| 01-Mar-11 | 20%  |
| 01-Mar-12 | 15%  |
| 01-Mar-13 | 10%  |

#### 2.4.6 Requirement to develop a reference interconnection offer

1. The Authority stated that those licensees listed in Regulation 6(2) of GG 33121 must develop a reference interconnection offer ("RIO").
2. Vodacom proposed that all licensees be required to develop a RIO (page 22 of Vodacom's written submission).
3. The Authority determines that it is not necessary for all licensees to develop a RIO and only those licensees identified in Regulation 7(5)(a) are required to comply with the submission of a RIO to the Authority for review.
4. Licensees also raised concerns about the maximum time period of 15 days required to complete an interconnection agreement (Regulation 8(7) of GG 33121).
5. The Authority accepts that certain interconnection agreements may require "non-standard" features.
6. However, given a typical circumstance where standard procedures are to be followed, using the same points of interconnect already in use by other licensees, or through a hosting centre, the Authority sees no reason why an interconnection agreement cannot be concluded within 15 days from a technical perspective.
7. Regarding commercial concerns, the Authority expects interconnection providers to be able to conduct any credit vetting procedures within the 15 days.
8. Therefore, the Authority is of the view that the only reasons why an interconnection agreement cannot be concluded within 15 days are the following:
  - a. The interconnection seeker fails to provide relevant information regarding technical requirements;
  - b. The interconnection seeker fails to provide relevant information regarding commercial requirements for surety regarding bank guarantees.
9. Therefore, a delay in completing an interconnection agreement within 15 days may only be a result of delays caused by the interconnection seeker.
10. The Authority will review RIOs submitted to it under Regulation 7(5)(a).
11. The Authority will particularly focus on the following components of a RIO:
  - a. The terms and conditions regarding bank guarantees:
    - i. The role of a bank guarantee is to ensure that an interconnection provider is not prejudiced if an interconnection seeker is unable to pay the due termination revenue at the end of each billing period.
    - ii. Excessively high bank guarantees may represent an implicit refusal to deal in which event an interconnection provider may foreclose entry to a new entrant or interconnection seeker.

- iii. The Authority has concerns regarding the high level of bank guarantees charged historically as well as the terms included in existing interconnection agreements, such as the "unconditional right to increase a bank guarantee".
- iv. An interconnection agreement is an agreement between two parties that is required to include terms and conditions that not only comply with the obligation to interconnect (section 37(1) of the ECA), but also foster a fair and non-discriminatory access regime.
- v. The Authority has on several occasions informed licensees of its concerns regarding the inclusion of an "unconditional right to increase a bank guarantee".
- vi. The Authority determines that bank guarantees, if necessary, must be based on objective and transparent criteria.
- vii. Furthermore, where a bank guarantee is agreed-upon, each party to an interconnection agreement is to be afforded the right to request and review the level of any guarantee conditions based on good cause shown.
- viii. **The Authority determines that the upper limit to the value of any bank guarantee in a RIO is the value of three months forecast terminating traffic.**
- ix. The Authority determines that the above position ensures that no party to any interconnection agreement with any licensee experiences any discrimination.
- b. The terms and conditions regarding minimum traffic/revenue requirements:
  - i. The objective role of a minimum traffic guarantee is to ensure that the interconnection provider does not suffer any prejudicial investment cost in terms of the creation of a "stranded asset", i.e. the expenditure incurred in establishing the point of interconnection is not recovered from revenue received from the interconnection seeker.
  - ii. However, excessively high minimum traffic/revenue requirements may also represent implicit market foreclosure as discussed regarding excessively high bank guarantees.
  - iii. If a minimum traffic/revenue requirement is to be included in a RIO, justification for such must be provided.
- c. Signalling protocols:
  - i. Traditionally, South African licensees have provided interconnection exclusively on a TDM-basis, requiring any interconnection seeker to convert traffic to and from their network into the requisite standard as set by the interconnection provider, and cover the costs thereof (e.g. conversion to SS7).
  - ii. This practice is fair and reasonable and justified if the interconnection provider uses the same protocols for transport within its network.
  - iii. However, if the interconnection provider manages its internal network traffic through another protocol, such as SIP, then it would be discriminatory for the interconnection provider not to provide the opportunity for an interconnection seeker to interconnect using such a signalling protocol.
- d. Points of interconnection:
  - i. It may not be necessary for interconnecting parties to have a direct interconnection link.
  - ii. Licensees should consider the approach of an open connection point where all licensees who seek to interconnect may do so, e.g. through the use of a hosting centre or "interconnection hotel."



- iii. In this scenario, the Authority expects each licensee to provide/pay for its own point of interconnection link, removing the "stranded asset concern", thereby removing the need for any minimum traffic guarantee.

#### 2.4.7 Monitoring Reports

The Authority has reviewed the concerns raised by licensees and has determined that such information is to be included in the Compliance Procedures Manual.

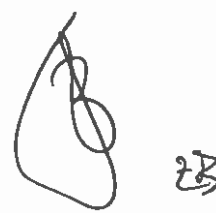
#### 2.5 Within and Between ON geographic area codes, points of interconnection and retail tariffs

1. The Authority is aware that certain licensees charge their customers a set off-net retail fee regardless of the geographic source and destination of an off-net call. This retail pricing practice ignores the cost causation principle in carrying traffic from one location to another.
2. Although the Authority has no intention of specifically regulating retail services at this juncture, the Authority requires all licensees to review the structure of their retail tariffs such that the retail fee charged for off-net calls reflects the characteristics of points of interconnection and the applicable charges for termination between licensees.
3. The Authority is also aware that it may be financially and technically feasible for points of interconnection to take place between Telkom and any other licensee at levels at the ONN level of Telkom's network. Such a point of interconnection was envisaged in the Telkom/Neotel interconnection agreement signed in 2007.
4. The Authority understands that this may not be possible at all geographic locations, but a request for such a point of interconnection may not be refused in those geographic areas where it is possible, as governed by section 37 of the ECA and the Interconnection Regulations (GG 33101).

#### 2.6 Retention rates

1. The Authority is aware of concerns regarding retention rates, particularly ECN Telecommunication's complaint lodged against Telkom at the Competition Commission of South Africa on the 16th of October 2009.
2. The Authority will closely monitor any response by licensees to the introduction of asymmetric termination rates and whether any increase to the retail price of an off-net call occurs.
3. The Authority is also aware of the practice of having specific charges for "call set-up" costs, i.e. a retail fee that is charged independently of usage.
4. This feature of retail pricing has been regulated in other jurisdictions.<sup>9</sup>
5. The Authority will also monitor this feature of retail pricing diligently over the next three years.

<sup>9</sup> <http://www.opta.nl/nl/actueel/alle-publicaties/publicatie/7id=3224>

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## 2.7 Convergence

1. The Authority notes the points raised by stakeholders as well as observable trends in certain jurisdictions tending towards lower and converging mobile and fixed termination rates and will monitor these trends during the review period.
2. However, for the period 2011 to 2014, the Authority does not consider that technological convergence equates to convergence of the cost to terminate a call to a mobile compared to a fixed location.

## 3. The Authority's expectations

The Authority expects the imposition of pro-competitive terms and conditions on Markets 1 and 2 to achieve the following:

- a. A more efficient and effective access regime;
- b. A more dynamic retail pricing environment; and
- c. Continued access and investment in electronic communications networks in South Africa.

### 3.1 A more efficient and effective access regime

1. The aim of the RIO is to remove any potential imbalance between licensees when commercially negotiating interconnection agreements. Furthermore, the Authority expects such interconnection agreements that are concluded to foster the efficient use of networks, i.e. stimulating the use of transit services or hosting arrangements where many licensees may interconnect with each other at a few distinct geographic locations.
2. The Authority expects the following to be visible outcomes of the imposition of the RIO obligation:
  - a. Reduced timeframes for concluding interconnection agreements;
  - b. Reduced and justifiable non-price obligations on both parties to an interconnection agreement;
  - c. More efficient use of networks through the use of transit services and specific hosting centres.
3. The Authority expects the impact of the above to lead to a reduction in the input costs for points of interconnection (both in time and infrastructure) thereby reducing the cost burden on existing and new entrants alike. The Authority expects the following feed-through impact to be:
  - a. A greater number of licensees considering entering the retail voice services market;
  - b. An increase in volumes of traffic between networks; and
  - c. More competitive retail price offerings, particularly in the offering of retail voice services to a fixed location.

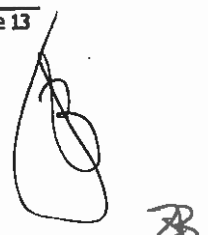


### **3.2 A more dynamic retail pricing environment through a reduction in wholesale voice call termination rates**

1. The retail price environment is where licensees are able to leverage off their economies of scale and scope as well as the ability to set prices for other licensees in terms of the price offered to end-users for off-net calls.
2. A reduction in termination rates does not necessarily feed through directly to a reduction in retail rates.
3. The objective of reducing wholesale voice call termination rates is to reduce the barrier to entry in the provision of off-net calls thereby fostering competition and a dynamic reduction in retail prices over time.
4. The Authority expects the following to be visible outcomes of a reduction in wholesale voice call termination rates:
  - a. A reduction in the barriers to entry for competitors in competing for a broader spectrum of the retail market, i.e. smaller licensees are expected to move away from a pure niche retail market focus towards greater overall participation in the provision of services to all consumers;
  - b. A reduction in the price charged to an end-user for a voice call placed from a fixed location to a mobile location; and
  - c. An increase in dynamic pricing packages for voice calls between networks of licensees who offer termination to a mobile location.
5. The Authority expects the impact of the above to be the following:
  - a. An increase in the level of competition in the provision of retail services to end-users at a fixed location;
  - b. A reduction in the price of a call from a fixed to a mobile location; and
  - c. A reduction in the price of a call from a mobile location to both mobile and fixed locations over time as licensees adjust to greater competitive pressures.

### **3.3 Continued access and investment in electronic communications networks in South Africa**

The Authority's determinations are considered to be suitable for fostering competition as well as ensuring the correct incentives for long-term sustainable investments in enhancing geographic coverage and penetration for all services.



#### 4. Conclusions

1. As stated by stakeholders<sup>10</sup>, the regulation of termination rates in South Africa has been benign. This benign environment allowed for both the diffusion and geographic availability of a multitude of services, notably mobile telephony services.
2. However, it is now time for all South Africans to benefit from the existence of the past benign environment. The Authority now believes it necessary for termination rates to be lowered to foster competition and allow the benefits of the past regime to flow through to end-users, ultimately in lower retail prices.
3. The Authority will vigilantly monitor all trends to ensure that the implementation of the pro-competitive terms and conditions imposed in these regulations takes place quickly and without any infraction.

<sup>10</sup> See, for example, page 7 of the transcripts of the public hearings on the draft Call Termination Regulations held on the 28<sup>th</sup> of June 2010.

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## GENERAL NOTICE

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NOTICE 57 OF 2011



**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

**"IMPLEMENTATION OF THE ASYMMETRY PROVISIONS OF THE CALL  
TERMINATION REGULATIONS (RELEASED IN GOVERNMENT GAZETTE  
33698)**

I, Stephen Mncube, Chairperson of the Independent Communications Authority of South Africa hereby publish a Practice Note to all stakeholders entitled "Implementation of the Asymmetry Provisions of the Call Termination Regulations

  
Dr Stephen Mncube  
Chairperson

 28



**Independent Communications Authority of South Africa**  
Pinmill Farm, 164 Katherine Street, Sandton  
Private Bag X10002, Sandton, 2146

**PRACTICE NOTE ON THE IMPLEMENTATION OF THE ASYMMETRY PROVISIONS OF  
THE CALL TERMINATION REGULATIONS**

**Date of issue: 28 January 2010**

**1. Purpose**

1.1. The purpose of this practice note is to provide clarity to stakeholders on the asymmetry provisions of Appendix B of the Call Terminations released on the 29<sup>th</sup> of October 2010 in Government Gazette No. 33698.

1.2. The specific areas to be clarified are:

- 1.2.1. What market is the licensee in?
- 1.2.2. What is Within Billing Zone and Beyond Billing Zone?
- 1.2.3. Is it possible to charge different wholesale call termination rates to different licensees?
- 1.2.4. How does a licensee qualify for asymmetry under the provisions of Appendix B of the regulations?
- 1.2.5. Can the right to charge an asymmetric rate be revoked?
- 1.2.6. What is the maximum allowable rate which a licensee may charge?
- 1.2.7. Is the Community Service Telephone wholesale voice call termination rate still applicable?

**2. What market is the licensee in?**

2.1. The Authority has defined two markets:

- 2.1.1. Market 1: The market for wholesale voice call termination services to a mobile location on the network of each licensee who offers such a service within the Republic; and
- 2.1.2. Market 2: The market for wholesale voice call termination services to a fixed location on the network of each licensee who offers such a service within the Republic, consisting of:
  - 2.1.2.1. The market segment for wholesale voice call termination to a fixed location within an ON geographic area code; and
  - 2.1.2.2. The market segment for wholesale voice call termination to a fixed location between ON geographic area codes.

- 2.2. Market 1 consists of an ECNS or ECS licensee providing a wholesale call termination service to mobile subscriber equipment enabled by wireless technology. This service allows a subscriber to initiate/receive and continue a voice call for the duration of that call, despite any change in location, i.e. complete handover.
- 2.3. Market 2 consists of an ECNS or ECS licensee providing a wholesale voice call termination service provided to a fixed location, and includes call termination using fixed wireless services. This service requires a subscriber to remain at a specific geographic location for the duration of the call, or within a specific geographic boundary in the case of fixed wireless services, i.e. it is not possible for the subscriber to initiate/receive and continue a voice call during the call.
- 2.4. Any licensee who cannot offer full call handover as a retail service to subscribers therefore falls under the definition for Market 2.
- 3. How to interpret "Within ON code" and "Between ON code"**
- 3.1. The Authority defined "ON" as a "geographic area code as specified in Regulation 6 of the Numbering Plan Regulations"<sup>1</sup>
- 3.2. The geographic area codes in Regulations 6 of the Numbering Plan regulations is reproduced below:
- | Geographic Area Code | Geographic Region                                    |
|----------------------|--|
| 01                   | Gauteng, Limpopo, North west Province and Mpumalanga |
| 02                   | Parts of Western Cape                                |
| 03                   | KwaZulu – Natal and parts of Eastern Cape            |
| 04                   | Eastern Cape and parts of Western Cape               |
| 05                   | Free State and Northern Cape                         |
- Figure 1: Geographic area codes assigned to fixed location services<sup>2</sup>
- 3.3. There are three scenarios to be considered in establishing which rate to apply for wholesale fixed call termination to a fixed location.

<sup>1</sup> Definitions section of the Call Termination regulations, GG 33698.

<sup>2</sup> Regulation 6 of Numbering Plan Regulations, GG 28839.

- 3.3.1. Scenario 1: Subscriber A on Licensee A's network calls Subscriber B on Licensee B's network. The subscribers are in the same geographic regions according to the geographic area code. The transfer of traffic between licensees (termination) takes place over a point of interconnection within the same geographic area code as assigned to Subscriber B. The "Within ON code" wholesale call termination rate applies. See Figure 1.

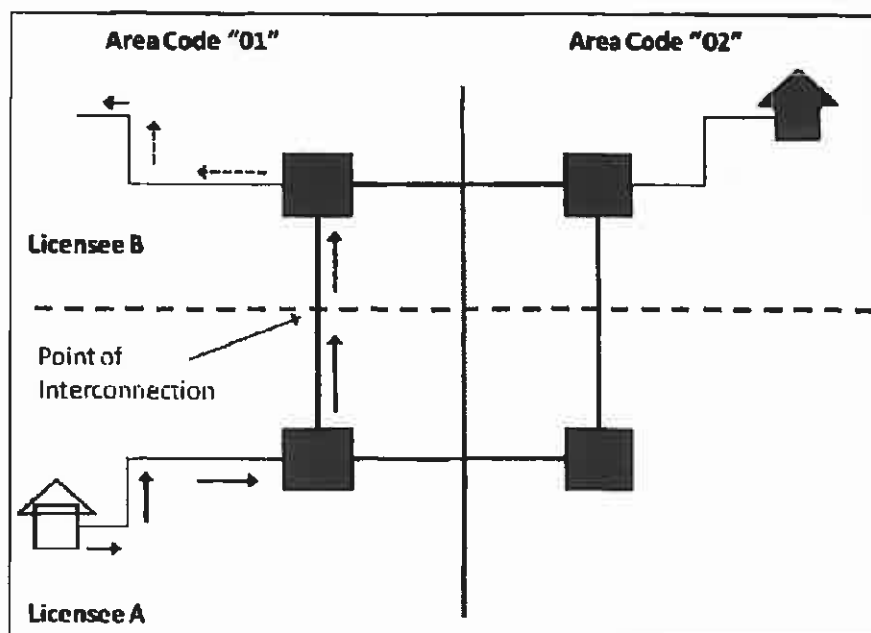


Figure 1. Within ON Area code termination: subscribers and point of Interconnection in the same geographic area

- 3.3.2. Scenario 2: Subscriber A on Licensee A's network calls Subscriber B on Licensee B's network. The subscribers are in different geographic regions according to the geographic area code. The transfer of traffic between licensees (termination) takes place over a point of interconnection in the same geographic area code that is assigned to Subscriber B. Again, the "Within ON code" wholesale call termination rate applies. See Figure 2.

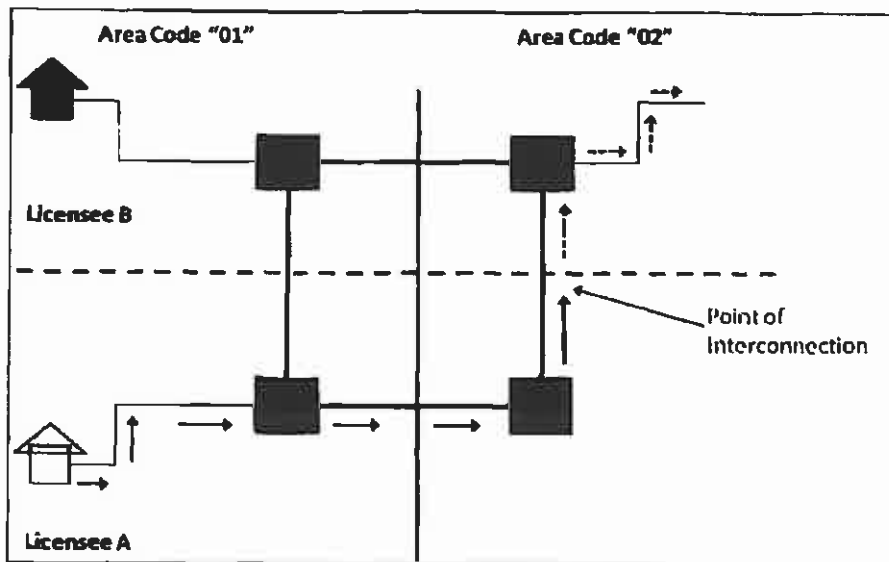


Figure 2. Within ON Area code termination: point of interconnection is in the same geographic area code as the receiver of the call

3.3.3. Subscriber A on Licensee A's network calls Subscriber B on Licensee B's network. The subscribers are in different geographic regions according to the geographic area code. The transfer of traffic between licensees (termination) takes place over a point of interconnection in the same geographic area code that is assigned to Subscriber A. The "Between ON" wholesale call termination rate applies. See Figure 3.

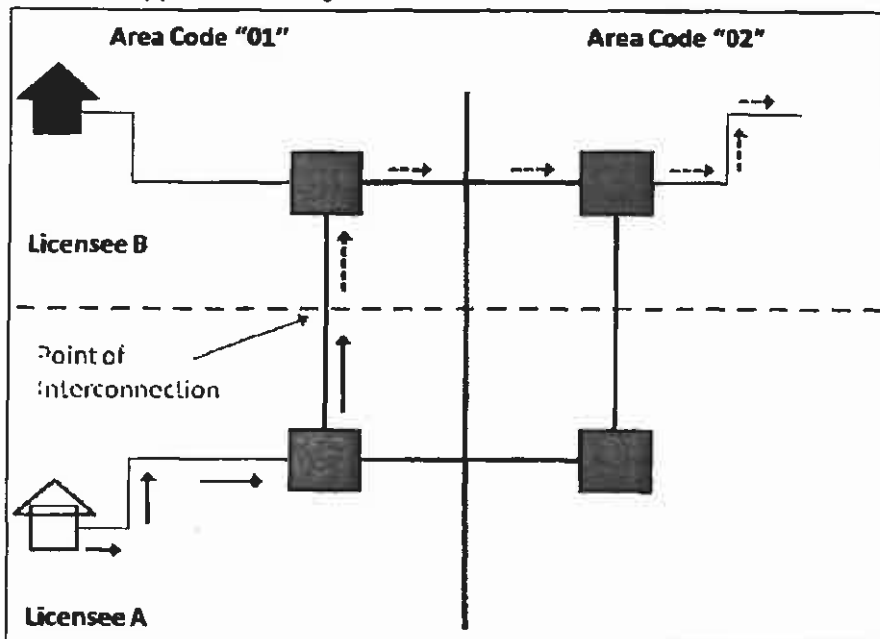


Figure 3. Between ON area codes termination: point of interconnection is in the same geographic area code as the originator of the call

*[Handwritten signature]*

3.4. Charging for wholesale voice call termination to a fixed location to a non-geographic number. The applicable wholesale call termination rate should be determined by licensees through commercial negotiation. The termination rate applicable to non-geographic numbers cannot be higher than the rate established for "Beyond ON area code" and is expected to be lower, based on traffic flow analysis and agreement between licensees.

**4. Is it possible for a licensee to charge different wholesale call termination rates to different licensees?**

4.1. Based on the finding that all licensees have significant market in the market in which they operate, every licensee is subject to the non-discrimination provisions of the Interconnection Regulations (GG 33101) and specifically Regulations 10(3) which states that:

*An interconnection provider must apply similar terms and conditions, including those relating to rates and charges, in similar circumstances to itself, affiliates and other interconnection seekers, providing similar services, unless otherwise requested by the interconnecting party.*

4.2. Practical interpretation of Regulation 10(3) of the Interconnection Regulations given the finding that all licensees have significant market power means that a licensee may charge one wholesale call termination rate per market in which the licensee participates.

4.3. The wholesale call termination rate which a licensee charges is not based on the source of interconnecting traffic but on the destination for the interconnecting traffic, i.e. wholesale voice call termination to a mobile or fixed location.

**5. How does a licensee qualify for asymmetry under the provisions of Appendix B of the regulations?**

5.1. No licensee has an automatic right to charge an asymmetric wholesale call termination rate. The conditions under which a licensee may charge an asymmetric wholesale call termination rate are clearly stipulated in Appendix B of the Call Termination regulations. Licensees not required to comply with the price control are able to charge a (higher) termination rate based on the following factors:

5.1.1. Spectrum allocation: A licensee must justify why it is adversely affected by current spectrum allocation; and/or

5.1.2. Economies of scale and scope based on the share of total minutes terminated in the relevant market: A licensee qualifies for an asymmetric rate if it has less than 25 per cent of total terminated minutes in the relevant market as of June 2009.

5.2. Appendix B of the regulations state that any licensee who may show it has been adversely affected by current spectrum allocations may offer an asymmetric termination rate. It is up to a licensee concerned to prove to the Authority that it deserves an asymmetric wholesale call termination rate based on spectrum allocation. The Authority will address such matters on a case-by-case basis.

5.3. However, another way the same licensee may qualify for an asymmetric termination rate is if the licensee has a share of less than 25% of total terminated minutes in the relevant market as of June 2009.

5.4. The relevant market in this case is the total number of minutes terminated in the relevant retail market, i.e. total minutes terminated to either a mobile or a fixed location as indicated in Tables 2.3 and Table 2.4 on pages 55 and 56 of GG 33121.

5.5. The shares of total terminated minutes in relation to the relevant markets using this metric are illustrated in Table 1 below:

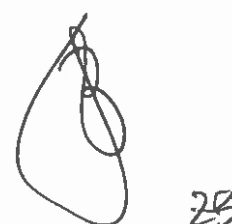
Table 1: Licensee share of total terminated minutes as of June 2009<sup>3</sup>

| Market 1: Termination to a mobile location |                  |
|--|------------------|
| Licensee                                   | Percentage share |
| Licensee 1                                 | 43%              |
| Licensee 2                                 | 42%              |
| Licensee 3                                 | 14%              |
| Market 2: Termination to a fixed location  |                  |
| Licensee name                              | Percentage share |
| Licensee 1                                 | 98%              |
| All other fixed licensees                  | 2%               |

5.6. Table 1 above indicates that, for now:

5.6.1. All licensees other than MTN and Vodacom are entitled to charge an asymmetric wholesale call termination rate for termination to a mobile location

<sup>3</sup> Sourced from industry submissions to the Call Termination questionnaire released in 2009.



5.6.2. All licensees other than Telkom are entitled to charge an asymmetric wholesale call termination for termination to a fixed location

**6. Can the right to charge an asymmetric rate be revoked?**

6.1. A licensee may lose the right to charge an asymmetric wholesale call termination rate if it achieves a share of equal to or greater than 25% per cent of total terminated minutes in the respective market.

6.2. All licensees are obliged to submit the relevant information to the Authority under Regulation 7(2)(b) of the Call Termination regulations by submitting requested information under the soon-to-be completed Compliance Manual regulations.

6.3. The Authority will make a determination as to whether certain licensees may continue to charge an asymmetric wholesale voice call termination rate based on the outcome of the analysis of industry submissions.

6.4. No licensee may lay a retrospective claim on another licensee that has gained a share of total terminated minutes in the respective market during a particular year of the glide-path.

**7. What is the maximum allowable rate which a licensee may charge?**

7.1. To ensure efficient pricing, the Authority has capped and reduced the asymmetric rate which a licensee may charge over time. Table 2 below indicates the allowable maximum percentage above the cost-oriented rate a licensee may charge.

**Table 2: The cap on non-regulated wholesale call termination rates**

|           | Maximum percentage above rate set for identified licensees |
|-----------|--|
| Current   | -  |
| 01-Mar-11 | 20%  |
| 01-Mar-12 | 15%  |
| 01-Mar-13 | 10%  |

7.2. The maximum allowable wholesale voice call termination rate is to be calculated using the following formula:

$$\text{Max rate} = \text{Regulated rate} \times (1 + \% \text{ allowance})$$

Where:



- Max rate =** the maximum wholesale voice call termination rate a licensee may charge
- Regulated rate =** the set rate, per market for each of the three years of the glidepath as specified in Regulation 7(5)(b) of the Call Termination Regulations
- % allowance =** the maximum percentage above rate set for identified for licensees as specified paragraph 2 of Annexure B of the Call Termination Regulations

7.3. Tables 3 and 4 below indicate the maximum wholesale voice call termination rate a licensee may charge under the asymmetry conditions in the regulations, per market.

**Table 3: Maximum allowable asymmetric rate in Market 1: Termination to a mobile location**

|           | Asymmetric allowance | Regulated rate |          | Max allowable termination rate |          |
|-----------|----------------------|----------------|----------|--------------------------------|----------|
|           |                      | Peak           | Off-peak | Peak                           | Off-peak |
| 01-Mar-11 | 20%                  | R 0.73         | R 0.65   | R 0.88                         | R 0.78   |
| 01-Mar-12 | 15%                  | R 0.56         | R 0.52   | R 0.64                         | R 0.60   |
| 01-Mar-13 | 10%                  | R 0.40         | R 0.40   | R 0.44                         | R 0.44   |

**Table 4: Maximum allowable asymmetric rate in Market 2: Termination to a fixed location**

|           | Asymmetric allowance | Within ON area code |          |                               |          | Between ON area code |          |                               |          |
|-----------|----------------------|---------------------|----------|-------------------------------|----------|----------------------|----------|-------------------------------|----------|
|           |                      | Regulated rate      |          | Max allowable asymmetric rate |          | Regulated rate       |          | Max allowable asymmetric rate |          |
|           |                      | Peak                | Off-peak | Peak                          | Off-peak | Peak                 | Off-peak | Peak                          | Off-peak |
| 01-Mar-11 | 20%                  | R 0.20              | R 0.12   | R 0.24                        | R 0.14   | R 0.28               | R 0.19   | R 0.34                        | R 0.23   |
| 01-Mar-12 | 15%                  | R 0.15              | R 0.12   | R 0.17                        | R 0.14   | R 0.25               | R 0.19   | R 0.29                        | R 0.22   |
| 01-Mar-13 | 10%                  | R 0.12              | R 0.12   | R 0.13                        | R 0.13   | R 0.19               | R 0.19   | R 0.21                        | R 0.21   |

7.4. The Authority would like all licensees to note that the Authority has no intention of determining wholesale call termination rates per licensee. Licensees who qualify to charge an asymmetric wholesale call termination rate may charge a rate up to the maximum specified rate per market, whilst ensuring compliance with the non-discrimination provisions of the Interconnection Regulations.



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**8. Is the Community Service Telephone wholesale voice call termination rate still applicable?**

8.1. The obligation to provide Community Service Telephones (CSTs) continues into the licensing regime of the ECA, with MTN, Cell C and Vodacom being obliged to maintain their Universal Service Obligations (USO's).

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## Explanatory Note to the Draft Call Termination Regulations

### 1. Introduction

- 1.1. The Authority introduced cost-oriented termination rates through the Wholesale Voice Call Termination Regulations (GG 33698) in October 2010.
- 1.2. The Authority has reviewed these regulations in line with Section 67(8) of the Electronic Communications Act, no 35 of 2006 (the "ECA"), where Section 67(8) states the following:

*67(8) Review of pro-competitive conditions:*

*(a) Where the Authority undertakes a review of the pro-competitive conditions imposed upon one or more licensees under this subsection, the Authority must—*

*(i) review the market determinations made on the basis of earlier analysis; and*

*(ii) decide whether to modify the pro-competitive conditions set by reference to a market determination;*

- 1.3. The Authority informed stakeholders of its intention to conduct such a review using the Request for Information published in Government Gazette 36532 on the 4th of June 2013.
- 1.4. This explanatory note is structured as follows:
  - 1.4.1. Market definition
  - 1.4.2. Determination of Significant Market Power
  - 1.4.3. Evaluation of the effectiveness of competition
  - 1.4.4. Pro-competitive remedies

### 2. Market Definition

- 2.1. After analysis of the information requested from licensees by the Authority, the Authority sees no need to amend the definitions of the markets as determined in 2010 because there is no technical change that changes the characteristics of termination to a mobile versus fixed location<sup>1</sup>
- 2.2. Therefore the market definitions remain the same:
  - 2.2.1. Market 1: The market for wholesale voice call termination services to a mobile location on each ECS/ECNS licensee's network who offers such a service within the Republic of South Africa.
  - 2.2.2. Market 2: The market for wholesale voice call termination services to a fixed location on each ECS/ECNS licensee's network who offers such a service within the Republic of South Africa, consisting of:
    - 2.2.2.1. The market segment for wholesale voice call termination to a fixed location within the 0N area code
    - 2.2.2.2. The market segment for wholesale voice call termination to a fixed location between 0N area codes<sup>2</sup>

<sup>1</sup> See page 48 of Government Gazette 33121 of 16 April 2019

<sup>2</sup> As per the National Numbering Plan

### 3. Determination of Significant Market Power

3.1. In 2010 the Authority determined that:

*"each ECNS and ECS licensee that offers wholesale voice call termination services has SMP in its own market"*<sup>3</sup>

3.2. After analysis of the information requested from licensees by the Authority, the Authority sees no reason to amend this determination, as the nature of voice call termination has not changed.<sup>4</sup>

### 4. Determination on the Effectiveness of Competition

4.1. In 2010 the Authority determined that the two markets for call termination were ineffectively competitive for the following reasons

- 4.1.1. a lack of the provision of access
- 4.1.2. the potential for discrimination between licensees offering similar services
- 4.1.3. a lack of transparency
- 4.1.4. inefficient pricing

4.2. Upon review of the conditions of the market, the Authority determined that the two markets remain ineffectively competitive, with the two markets being highly concentrated.

Table 1: Concentration in Market 1: Termination to a mobile location

| Termination Revenue Shares |          |          |          |          |
|----------------------------|----------|----------|----------|----------|
|                            | Jun-2011 | Dec-2011 | Jun-2012 | Dec-2012 |
| Licensee 1                 | 36%      | 35%      | 36%      | 37%      |
| Licensee 2                 | 44%      | 44%      | 46%      | 45%      |
| Licensee 3                 | 16%      | 17%      | 15%      | 14%      |
| Licensee 4                 | 4%       | 3%       | 4%       | 3%       |
| HHI                        | 3499     | 3511     | 3618     | 3660     |

Table 2: Concentration in Market 2: Termination to a fixed location

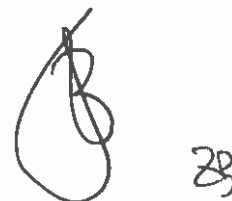
|            | 2011 | 2012 |
|------------|------|------|
| Licensee 1 | 98%  | 94%  |
| Licensee 2 | 2%   | 6%   |
| HHI        | 9664 | 8912 |

4.3. The Authority determines that these markets remain ineffectively competitive owing to inefficient pricing.

### 5. Pro-competitive Remedies

<sup>3</sup> Regulation 6 of the 2010 Regulations (Government Gazette 33698)

<sup>4</sup> See Section 2.3 on Countervailing Bargaining Power in Government Gazette 33121



- 5.1. Amongst others, the Authority imposed cost-oriented pricing on the pricing arrangements for voice call termination in the 2010 Regulations.
- 5.1.1. For Market 1, the Authority determined that the cost of termination in Market 1 was R 0.40 per minute.
- 5.1.2. For Market 2, the Authority determined that the cost of termination was R 0.19 and R 0.12 per minute dependent on the market segment in which the call is made.
- 5.2. On review of industry data, the Authority recommends revised rates for Market 1 whilst determining that there is no need to change the existing rates for Market 2
- 5.3. The Authority determines that the cost of termination in Market 1 is now approximately R 0.10 per minute based on, amongst others, the increase in traffic on licensees' networks, where an increase in traffic reduces the cost per unit in the provision of call termination services.
- 5.4. The Authority further determines that this level should be reached in three years. Therefore the proposed revised termination rates over the next three years are:

*Table 3: Mobile Termination Rates: 2014-2016*

|               | Rand | % Decline |
|---------------|------|-----------|
| 01 March 2013 | 0.40 |           |
| 01 March 2014 | 0.20 | 50%       |
| 01 March 2015 | 0.15 | 25%       |
| 01 March 2016 | 0.10 | 33%       |


*Table 4: Proposed fixed line termination rates: 2014-2016*

|                        | Between ON | Within ON |
|------------------------|------------|-----------|
| Fixed Termination Rate | R 0.19     | R 0.12    |

- 5.5. The 2010 Regulations also imposed a limited amount of asymmetry available to licensees that met certain criteria, as outlined in Appendix B of the 2010 Regulations.

*Table 5: Limitations to Asymmetry as per the 2010 Regulations*

|           | Maximum percentage above rate set for identified licensees |
|-----------|--|
| Current   | -  |
| 01-Mar-11 | 20%  |
| 01-Mar-12 | 15%  |
| 01-Mar-13 | 10%  |



5.6. The qualifying criteria for an asymmetric termination rate in 2010 were:

*“1.3. Licensees not listed in Regulation 7(4) (of 2010) may charge higher termination rates based on the following factors:*

*1.3.1. Spectrum allocation. A licensee must justify why it is adversely affected by current spectrum allocation.*

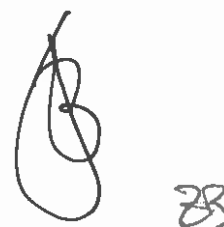
*1.3.2. Economies of scale and scope based on the share of total minutes terminated in the relevant market. A licensee qualifies for an asymmetric rate if it has less than 25 per cent of total terminated minutes in the relevant market as of June 2009.<sup>5</sup>”*

- 5.7. The Authority is of the view that the share of total terminated minutes should be reduced from 25 per cent of total terminated minutes to 20 per cent of total terminated minutes. This amendment is reflected in Appendix A of these draft Regulations.
- 5.8. The Authority is concerned that the markets continue to reflect ineffective competition and that a reduction in termination rates may not be sufficient.
- 5.9. The introduction of asymmetry is a regulatory determination taking into account a number of factors, including:
- 5.9.1. traffic imbalances reflecting economies of scale
  - 5.9.2. promotion of investment
  - 5.9.3. encouraging competition
  - 5.9.4. fostering SMMs
- 5.10. Given the importance of investment in infrastructure in ensuring the achievement of sufficient scale and the differences in traffic volumes that exist in Market 1, the Authority believes it necessary to sustain and increase asymmetry for a further period of five years.
- 5.11. At the end of this asymmetric period, licensees are to be charging symmetrical termination rates. However, in the interests of fostering small businesses, the Authority proposes that licensees with less than 10% of total terminated minutes in the respective market at the end of this five-year period may retain the asymmetric benefit of the final year.
- 5.12. The table below outlines the asymmetric glide-path of termination rates available to those licensees that meet the qualification criteria:

*Table 6: Maximum asymmetric termination rate which a qualifying licensee may charge for termination in Market 1*


|               | Maximum Rate |
|---------------|--------------|
| 01 March 2014 | R 0.39       |
| 01 March 2015 | R 0.33       |
| 01 March 2016 | R 0.26       |
| 01 March 2017 | R 0.20       |
| 01 March 2018 | R 0.14       |
| 01 March 2019 | R 0.20       |

<sup>5</sup> See “Appendix B: Application of the Fair and Reasonable Obligation” of the 2010 Regulations



*Table 7: Maximum asymmetric termination rate which a qualifying licensee may charge for termination in Market 2*

|               | Between ON | Within ON |
|---------------|------------|-----------|
| 01 March 2014 | 10%        | 10%       |
| 01 March 2015 | 10%        | 10%       |
| 01 March 2016 | 10%        | 10%       |
| 01 March 2017 | 10%        | 10%       |
| 01 March 2018 | 10%        | 10%       |
| 01 March 2019 | 10%        | 10%       |

  
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Private Bag 9955 Cresla 2118 South Africa  
Tel +2711 912 3000 Fax +2711 912 3001 <http://www.mtn.co.za>

**25 October 2013**

**Mr Christian Mhlanga**

Senior Manager: Markets & Competition

Independent Communications Authority of South Africa

Block A, Pinmill Farm

164 Katherine Street

Sandton

Via Email : [cmhlanga@icasa.org.za](mailto:cmhlanga@icasa.org.za)

Dear Sir,

**RE: CALL TERMINATION MARKET REVIEW: ONE ON ONE MEETINGS**

- 1) We refer to your letter dated 8 October 2013 and your email addressed to Mr. Graham de Vries on 22 October 2013 wherein you propose a meeting with MTN on 7 November 2013 at 09h00-10h30. MTN thanks the Authority for the opportunity to discuss its concerns and hereby accepts the meeting invitation.
- 2) MTN notes that the stated purpose of the meeting is to:
  - a) discuss the financial impact of the proposed call termination rates and,
  - b) request clarity with respect to items contained in the draft Call Termination Regulations ("the draft Regulations").
- 3) In order to properly engage on the items mentioned in a) and b) above, MTN proposes that the meeting also include a discussion of the following issues:


*Directors: RS Dabengwa (Chairman), Z Bulbulia (CEO)\*, R Gasani, NWC Molope, PD Norman, S Fekie, KW Pienaar, PG Sibiya\*, BD Goschen*

*Company Secretary: MML Mokoka \*Executive*

*Reg No. 1993/001436/07*

*Vat Reg. No. 4630140434*

*Registered Financial Service Provider. FSP Reg. No. 44774*

 **ZB**



- a. The draft Regulations contain call termination rates in Regulation 7(5) which are said to reflect "cost orientated pricing". In this regard, and in order to properly engage on the topic, MTN kindly requests that it be given the opportunity to inspect and analyze the costing study undertaken by the Authority to arrive at the proposed call termination rates. MTN wishes to have sight of the costing study in advance of the meeting on 11 November 2013, in order that it can interrogate the data and raise any concerns with ICASA.
  - b. The draft Regulations provide neither an explanation nor an analysis to explain the 75% reduction in the rates set by the Authority in 2010, the reversal of the asymmetry glide path or the 330% increase in asymmetry value proposed from 1 March 2014. In this regard, MTN requests that the Authority clarify the rationale for this radical departure from the 2010 Call Termination Regulation.
  - c. MTN requires clarity as to how the dynamics in Market 1, as defined, have deteriorated to such an extent that it would be justified to impose the new harsher remedies. In addition, MTN requests the Authority to indicate whether it has undertaken an analysis of the financial impact on MTN and the various other stakeholders impacted by the draft Regulation or an assessment of the proportionality of the remedy (as is required by S.67.8.c. of the Electronic Communications Act). If the Authority has conducted such an analysis, MTN requests a copy thereof in advance of the meeting.
  - d. MTN requests that the Authority provide MTN with any global or regional benchmarking study that may have been used by the Authority in support of the proposed rates and asymmetry.
- 4) The issues raised are complex and important not just to MTN but to the telecommunications industry and to those who make use of its services. You have proposed that we meet with you on the 7<sup>th</sup> of November for an hour-and-

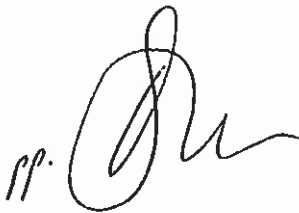


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a-half to discuss them. Whilst we greatly appreciate any opportunity to engage with you, we believe that very little, if anything, will be achieved during such a short session. Please would you let us know whether we can extend our discussions from 09:30 through to 13:00 so that we might at least "scratch the surface" in a meaningful way.

Your response hereto is eagerly awaited.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'G. de Vries', with a large loop at the end.

**GRAHAM DE VRIES**

**GENERAL MANAGER: REGULATORY AFFAIRS**

**MTN (PTY) LIMITED**

A handwritten signature in black ink, appearing to be 'B', with a large loop at the end.

B



ZB7<sup>215</sup>

**Independent Communications Authority of South Africa**

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**E-mail: [KStassen@icasa.org.za](mailto:KStassen@icasa.org.za)**

**Our ref: 2/13/7/19 Call Termination**

Mr Graham De Vries  
General Manager: Regulatory Affairs  
MTN (Pty) Ltd  
216 14th Avenue  
Fairland  
2195

Per email: [devrie\\_g@mtn.co.za](mailto:devrie_g@mtn.co.za)

Dear Mr de Vries

**RE: CALL TERMINATION MARKET REVIEW**

We acknowledge receipt of your letter dated 25 October 2013. The Authority invited MTN for a meeting to be held on 7 November 2013 in its letter dated 20<sup>th</sup> October 2013. The purpose of this meeting, as outlined in Point 4 of the Authority's Invitation was to provide MTN with an opportunity to share with the Authority, MTN's views on the "Implications of the proposed termination regulations on [MTN's] business in South Africa."

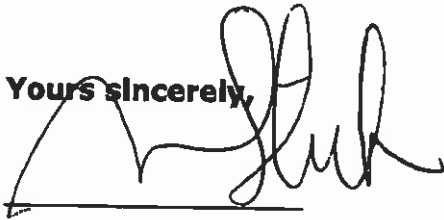
The Authority will be meeting with other stakeholders to discuss the same question. The Authority therefore requests MTN to provide its views on the matter within the given timeframe of the Authority's Invitation. The Authority

Dr SS Mncube (Chairperson), NA Batyi, WH Currie, JM Leboea, N Ndhlovu, KGS Pillay, Dr MM Socikwa,  
WF Stucke (Councillors), PK Pongwana (CEO)



looks forward to constructive debate in establishing a fair wholesale voice call termination rate regime.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Stucke', written over a horizontal line.

**William Stucke**  
**Councillor**

**Date:** 4.11.2013

Handwritten initials or a signature in the bottom right corner, consisting of a large 'B' and a smaller 'S'.



# Draft Call Termination Regulations

One to One meeting with ICASA 7 Nov 2013

everywhere you go

**CONFIDENTIAL IN TERMS OF SECTION 4D OF THE ICASA ACT**



*[Handwritten signatures]*

## Introduction



1. Various legal, regulatory and analytical issues identified; will be addressed in detail in our written submission.
2. Objectives of today's session:
  1. Highlight the proposals' impact on MTN, Government Policy and South African stakeholders;
  2. Seek clarification on how the Authority reached its key findings;
  3. Seek clarification on issues of implementation.
3. Confidential and market-sensitive information is included in this presentation; MTN claims confidentiality in terms of Section 4D of the ICASA act.



## IMPACT OF THE ICASA PROPOSALS

## The managed glide path proved a policy success



- Some commentators suggesting MNOs are immune to cuts:
  - (Unquantified) retail benefits available at “no cost”: MTR a policy “free lunch”
  - So ICASA can set rates as low as it wants: “10 to 15c”
  - MNOs in policy scare tactics.
- In fact, impact actively managed through business model adjustment:
  - Despite real jobs and investment cuts, the worst consequences of “a business model shock” were avoided thanks to the glide path.
  - Fact-based analysis backs ICASA’s 2010 policy and highlights the risks with the intervention “shock” being proposed now.

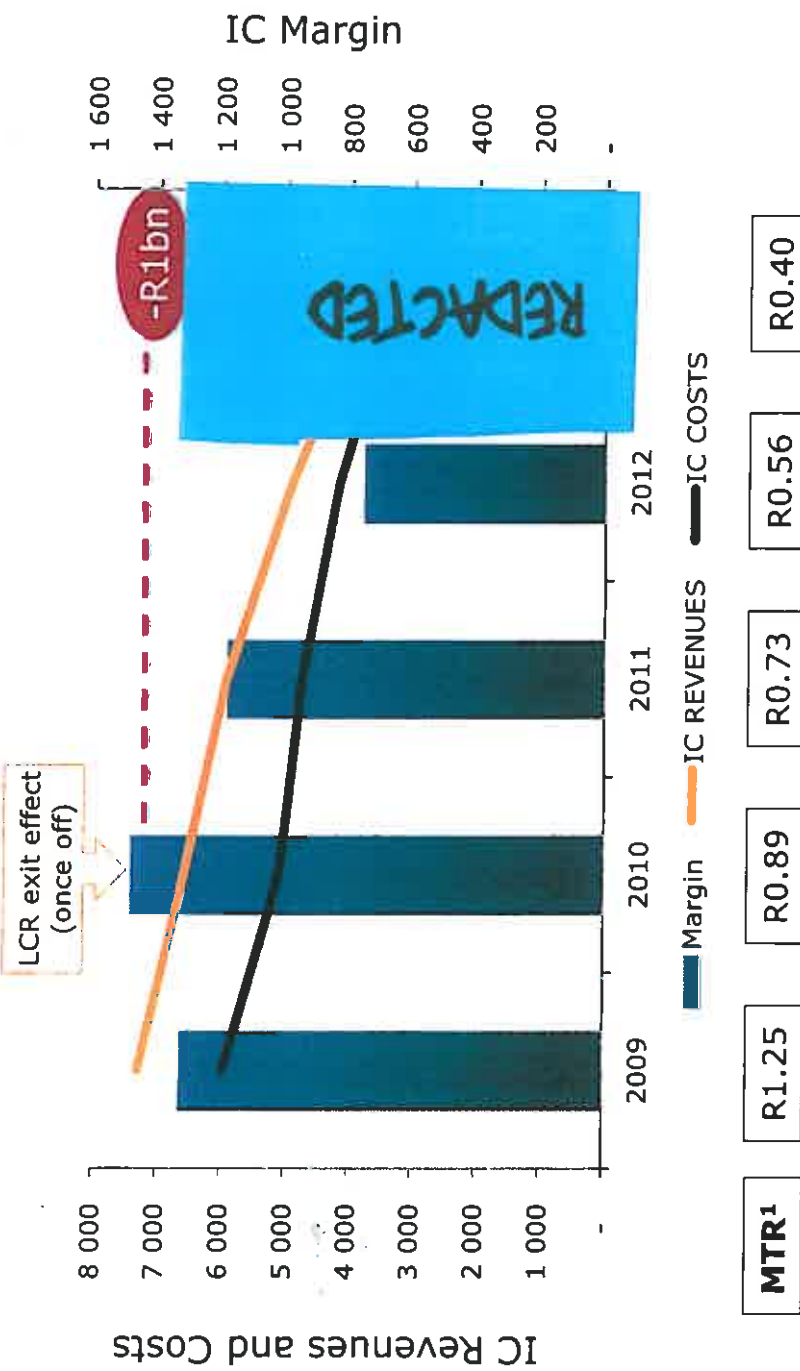


# What HAS happened – Net interconnection



## MTN net interconnection margin analysis

M ZAR

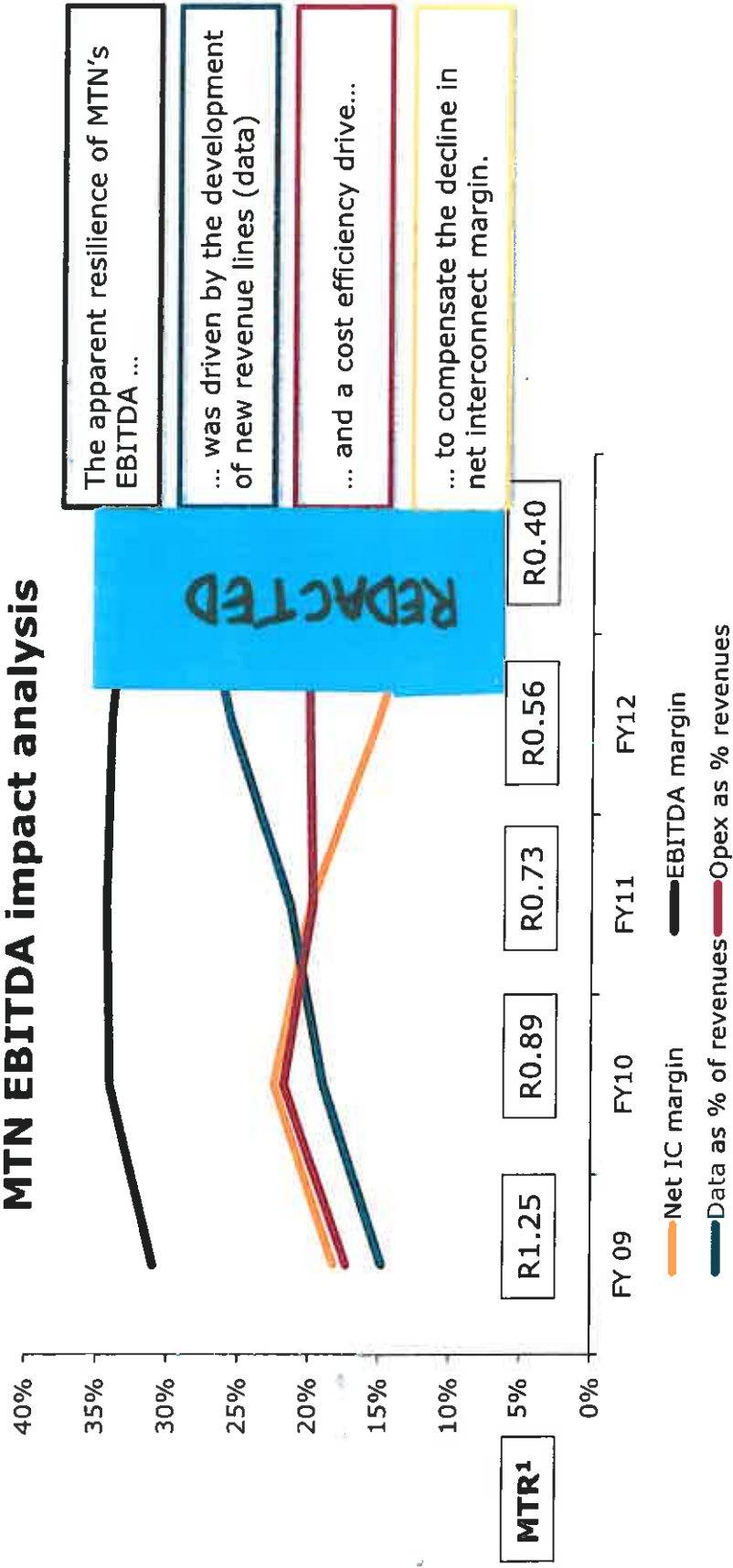


The 2010 cut and Regulations have had a R1bn impact on the contribution of interconnect to MTN's bottom line.

# What HAS happened – EBITDA margins



## MTN EBITDA impact analysis

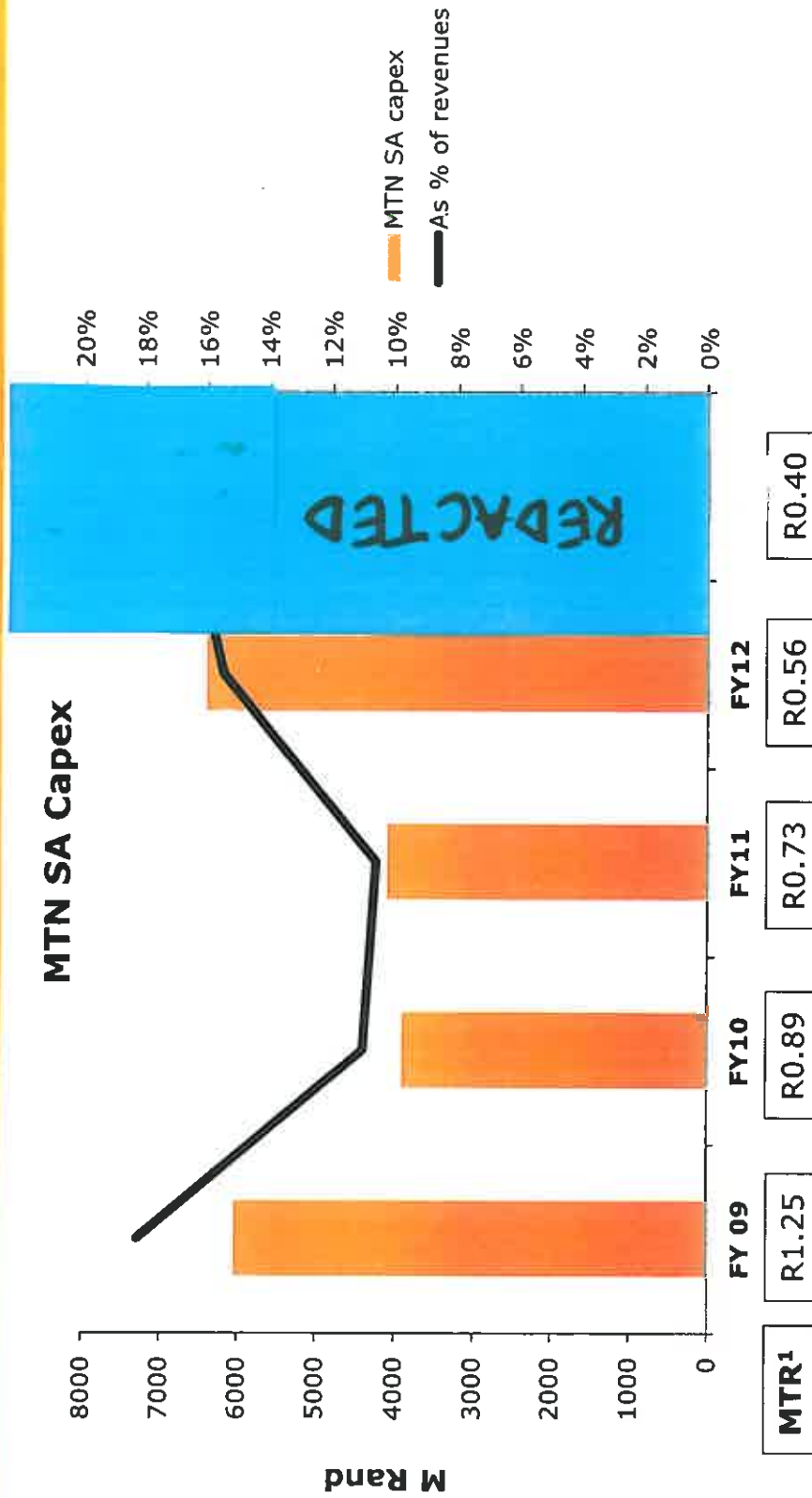


The managed glide path enabled smooth business model rebalancing. A shock intervention (such as the one proposed now) would have had a substantially harsher MTN and SA stakeholder impact.

1. PKJ at 31 Dec

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# What HAS happened – investment

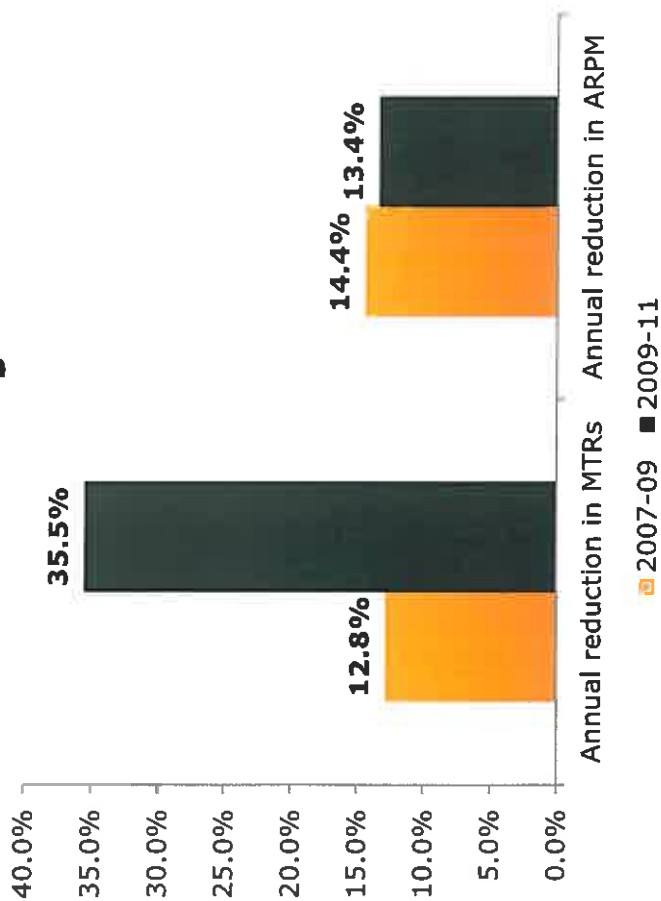


Significant reduction in capital intensity following 2010 cut and glide path. Only now recovering to levels last seen when MTRs were R1.25.

# What HAS happened – retail prices

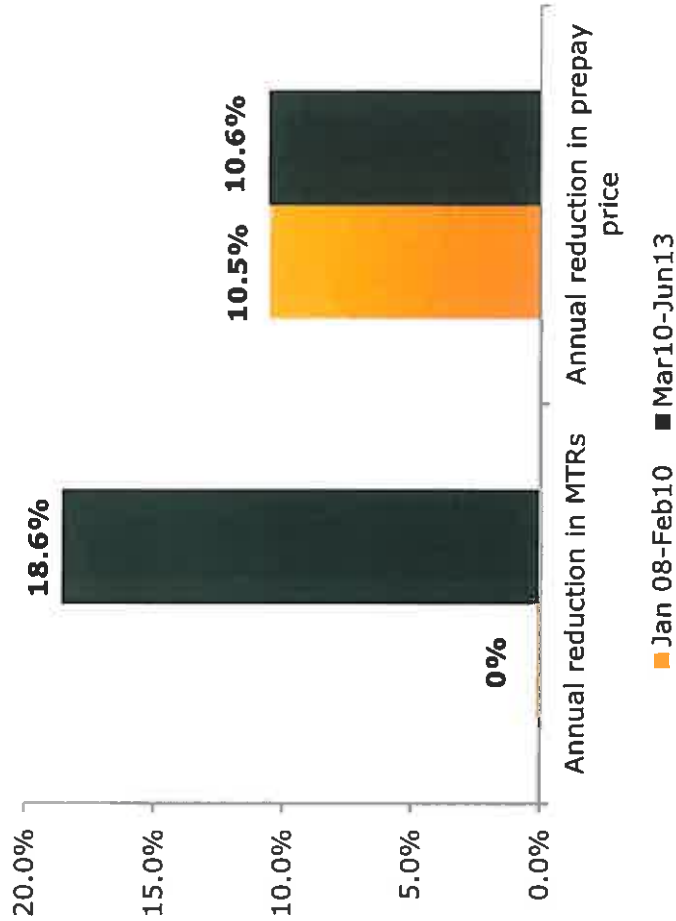


## EU findings<sup>1</sup>



- Econometric study across 24 EU countries found deeper MTR cuts had NO effect on retail prices

## RSA findings<sup>2</sup>



- EU findings replicated in South Africa

No statistical evidence of a link between rate of MTR cuts and retail price decline

1. Source: Frontier Economics, the impact of MTR cuts across Europe May 2012  
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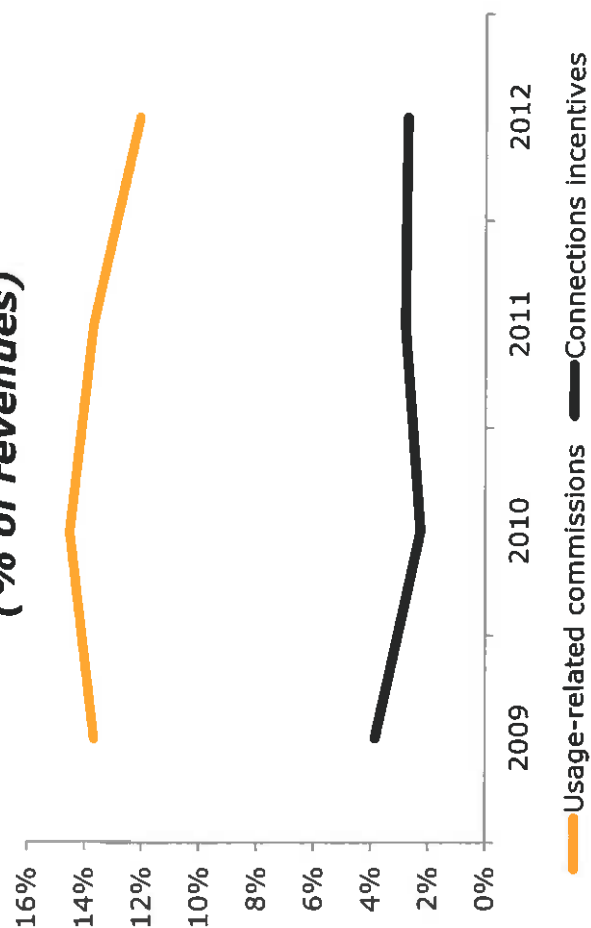
2. Source: MTN, TelCom analysis



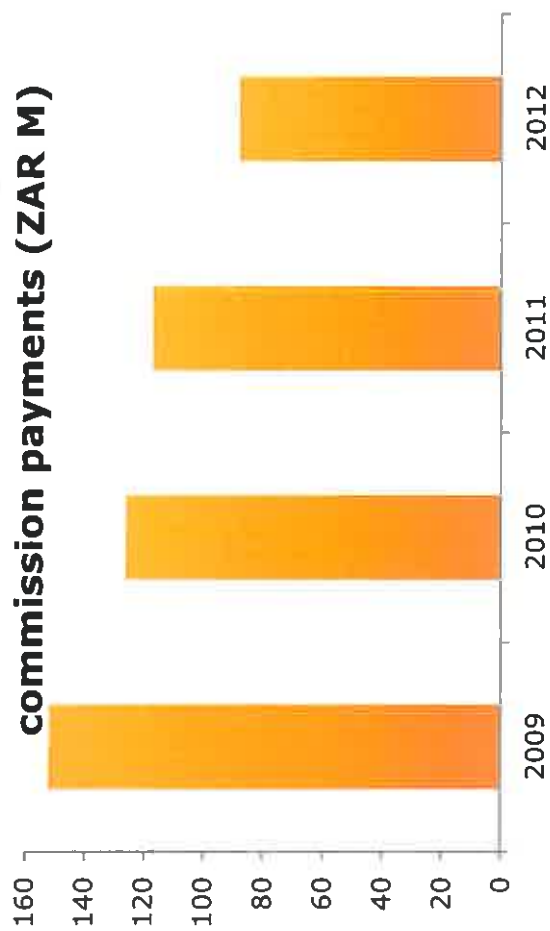
## What HAS happened – Prepay commissions and connections subsidies



**Prepay Commissions  
(% of revenues)**

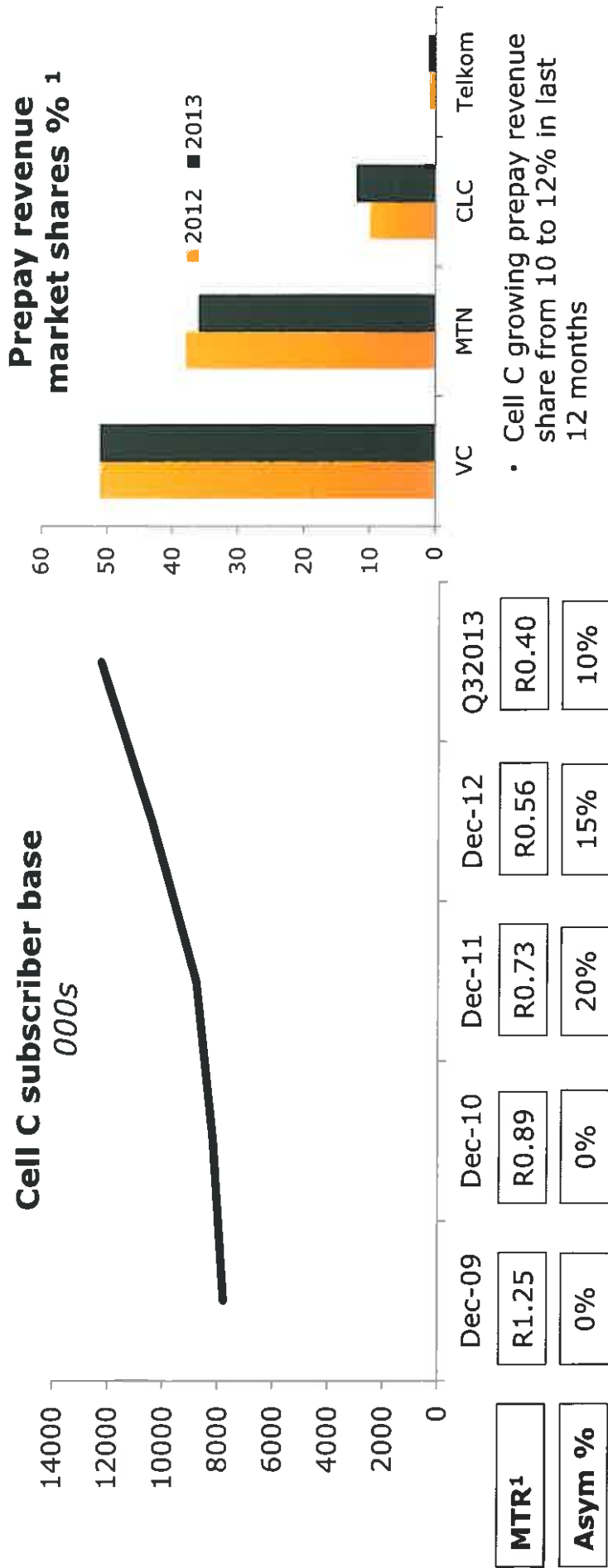


**MTN informal channel  
commission payments (ZAR M)**



- Reduction in prepay CIs and usage commissions = lower revenue base for channel partners = channel consolidation and/or shops closures and/or job losses.
  - eg. FNB: "1 more % off prepay usage comms = 1000 distribution jobs cut)
  - eg. 42% reduction in Yello stormers commission payments = reduced income for c. 2000 rural entrepreneurs.

# What HAS happened – Cell C growth



- Cell C boasting 33% subscriber growth over the last 18 months. 2pp revenue share during the last 12 months
- =substantial and valuable growth achieved at 4c asymmetry.
- What is the Authority's expected market impact and objective if Cell C is granted 375% increase in asymmetry (to 19c) in March 14?

## What HAS happened – additional stakeholders impact



### Job impact

- 1100 direct jobs cut by MTN in 2009/2010
- Reduction in CIs and commissions directly impacting jobs in distribution channel (eg. one national distributor suggests 1% cut in on-going comms = 1000 jobs)
- Cost cutting drive = IT outsourcing to IBM with SA job losses as supported from India

### LCR industry impact

- LCR business decimated by the 2010 decision
- Caused significant financial disruption – eg. Vox in a R750m impairment on its Orion acquisition as a result of the latter's dependence on LCR's.
- Job losses: Nashua retrenched 15% of its workforce in 2011 as a result of its exposure the end of the LCR business.

### Other:

- Cost cutting activities also impacted Telkom (transmission contract); maintenance partners, marketing activities...
- Efficiency drive also leading to consolidation (ISP, EBU, channel, etc.)

## What *WOULD* happen – MTN business plan

MTN

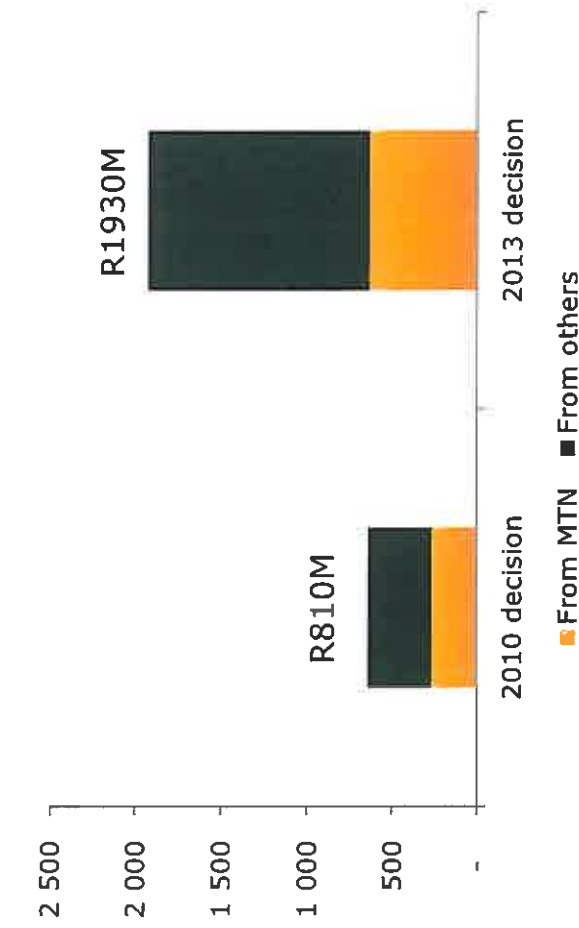
REDACTED



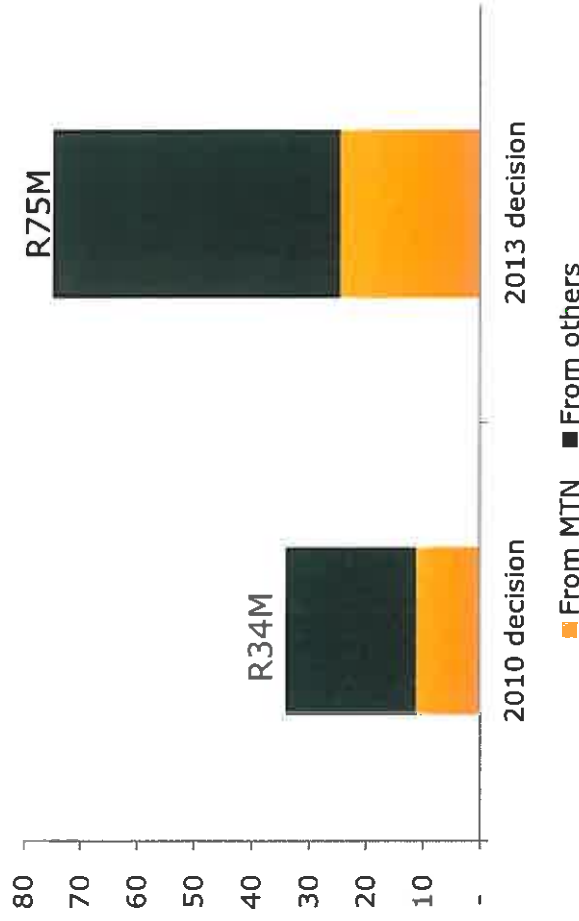
# What *WOULD* happen – Cell C and TM subsidy



Asymmetry value transfers to Cell C  
*R million, est.*



Asymmetry value transfers to TM  
*R million, est.*



- Lack of an objective cost basis for the proposed 19c / 95% asymmetry, yet:
  - Asymmetry proposals = R2bn regulatory subsidy granted to Cell C.
  - = R2bn "ICASA tax" on 80% of SA subscribers to fund Cell C's debt payments, its shareholders and/or its retail subscribers.

# What *WOULD* happen – estimated impact on SA stakeholders



## Jobs

- 700 direct job losses planned at MTN
- Larger indirect job losses in Maintenance and Channel partners (more than R1.5bn removed from these contracts – equivalent to >1500 jobs)
- Further reductions in rural informal channel

## Tax

- **REDACTED**

## BB for All

- R1.7bn removed from future LTE investment in the next 3 years
- Reduced maintenance (especially in rural areas) could impact QoS

## Other

- **REDACTED**

SA's lower than average returns already negatively impact the investment case

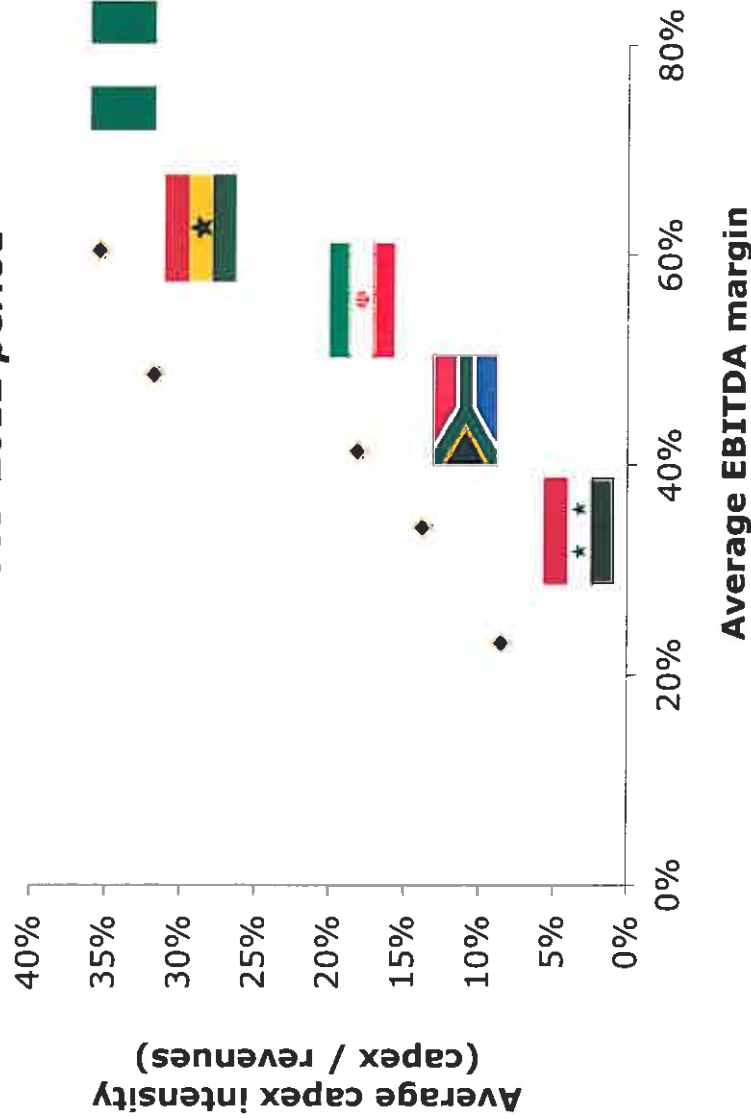


REDACTED

# Investment in SA's Broadband Future is at risk...



**OpCo EBITDA margins Vs investment by MTN Group<sup>1</sup>  
2009-2012 period**

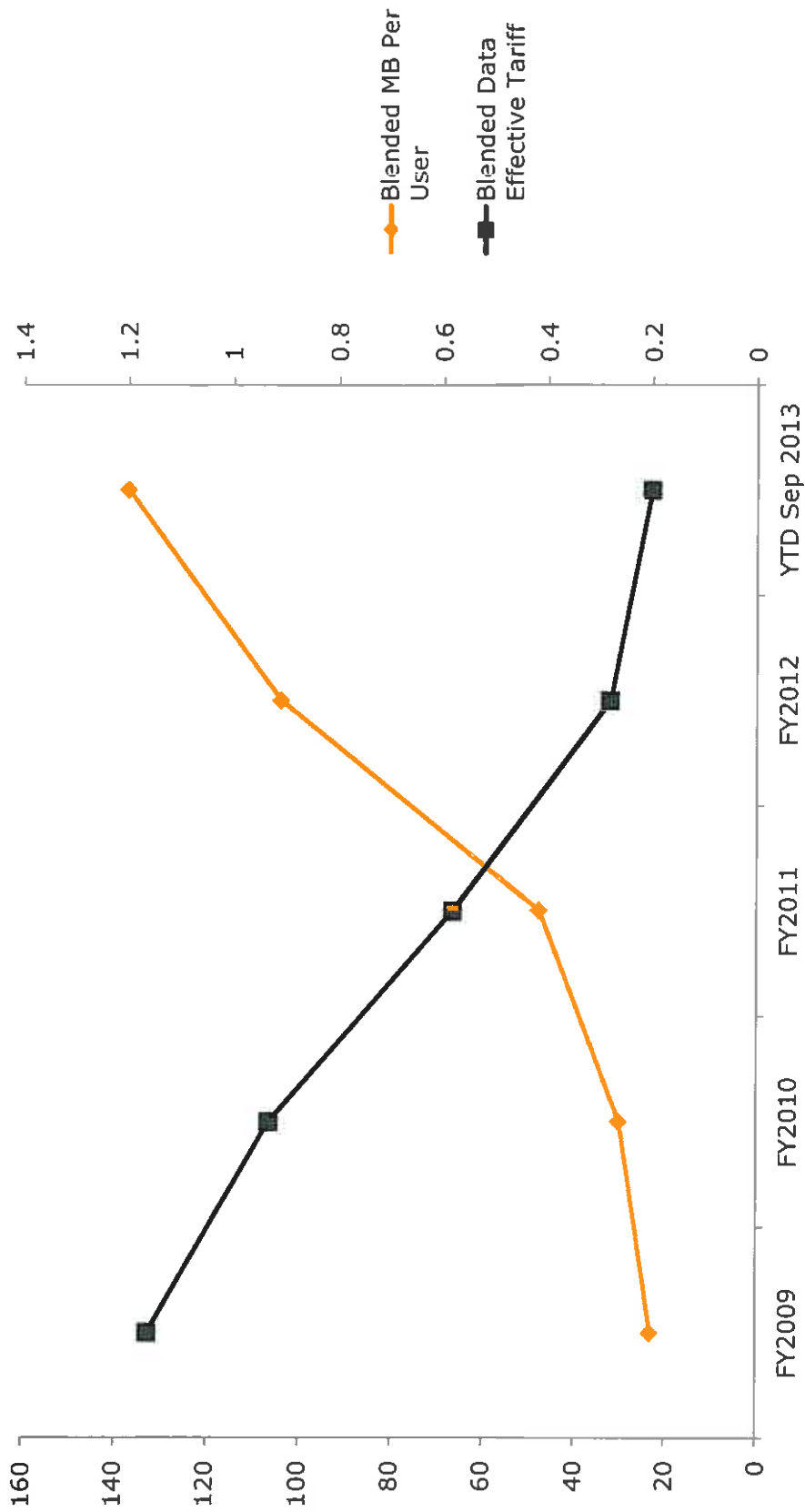


- Direct relationship between margins and investment across MTN properties
- ICASA proposals will directly impact MTN Group investment's choices going forward
- Already R1bn redirected in 2014 as a result of the *draft* call termination regulations

## ...threatening SA's mobile data success story



**Data prices have fallen by >70% in the last 3 years but requires continuous investment to support growth**





# Yet, competition is more than just about price

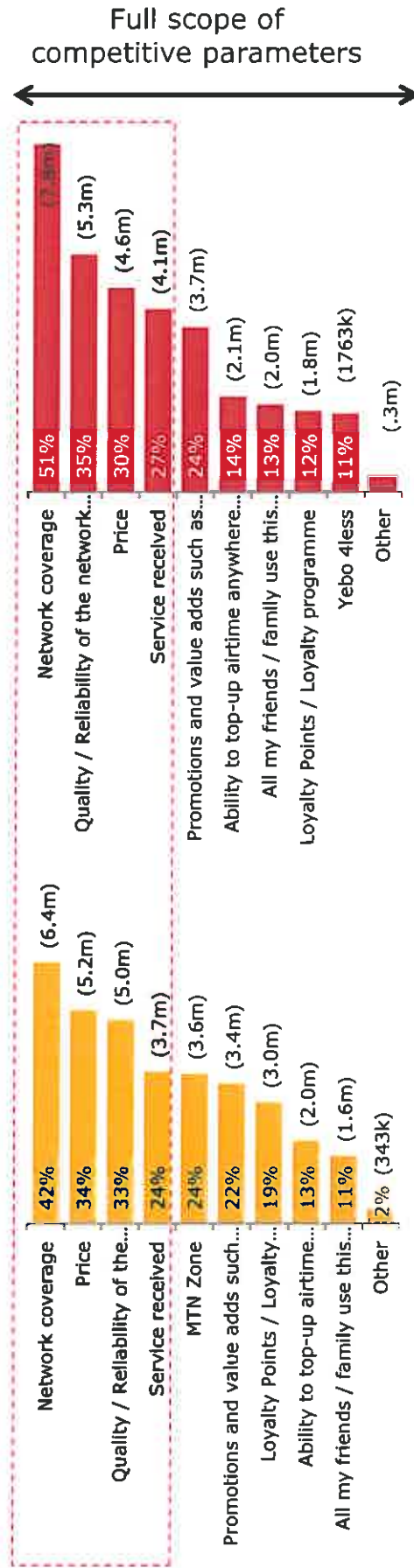


The top 3 reasons for our customers preferring us are Network coverage, Quality & Reliability of the network and Price. Network coverage has always been the number one reasons for preference for both MTN & VC

## Network choice drivers<sup>1</sup>

MTN subscriber

Competitor subscriber



- Authority solely focusing on price dimension of competition
- In fact competition take place across many different parameters (often investment-related: cf. coverage, QoS, distribution, customer service...)
- Explains why lowest price operator is not necessarily the highest share one – see Telkom 29c/min

## Impact analysis: conclusions



1. Multi-bn Rand impact on MTN, affecting market dynamics, jobs, investment levels and economic growth (vs. unquantified "retail" benefits).
  2. Draft decision *already* materially affected MTN Group and Financial Markets perception of South Africa as an investment destination.
  3. Direct impact on Government Broadband for All, employment, growth and fiscal objectives.
- Scale and impact of intervention requires a robust justification from ICASA.
- In the same way MTN was invited to assess the impact of the proposals on its business, MTN respectfully requests a quantification of the Authority's expected benefits from its proposals so proportionality can be assessed in line with S.67.8.c of the ECA.



## UNDERSTANDING THE BASIS FOR ICASA'S PROPOSALS



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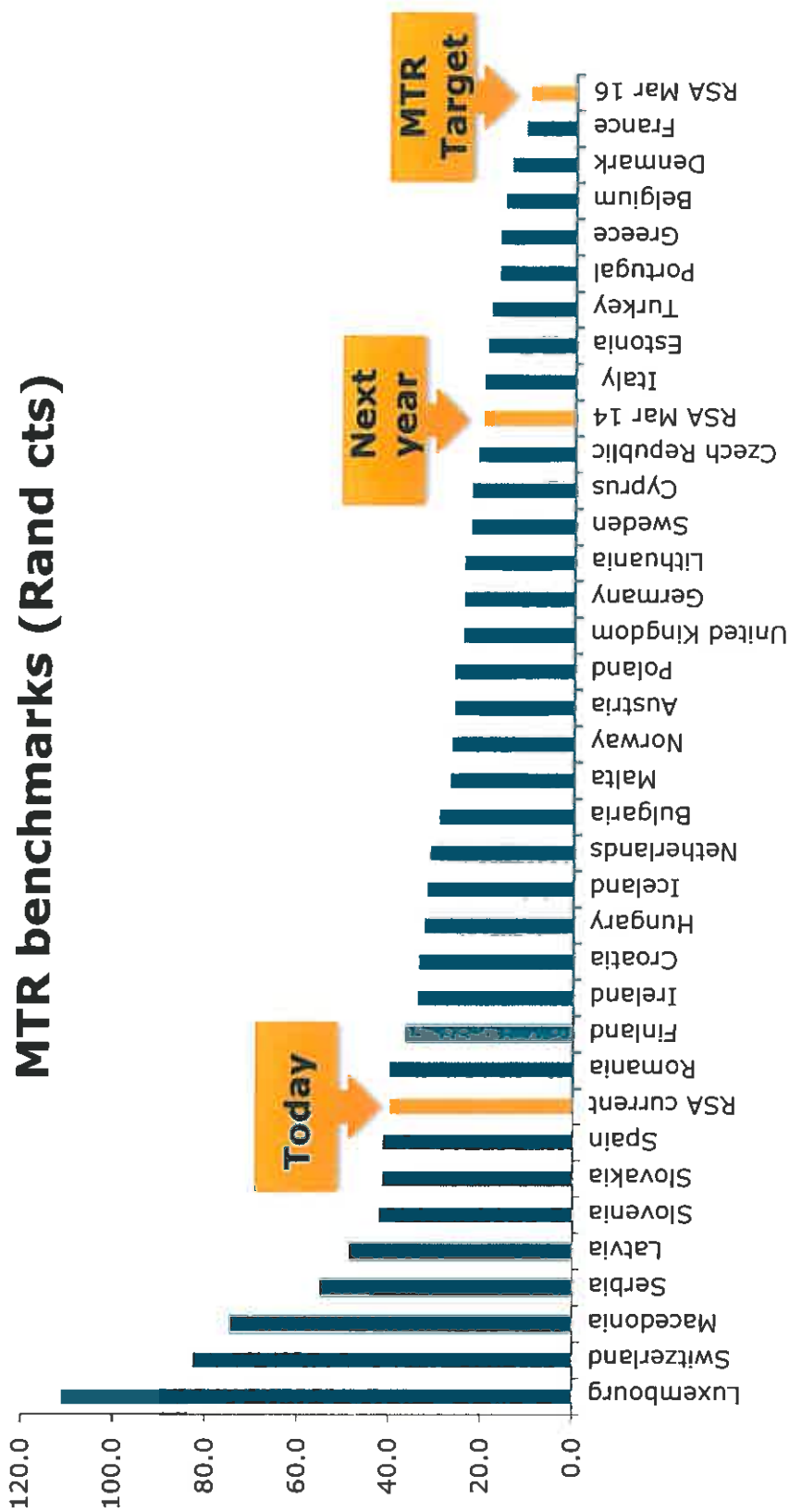
## MTN has no insight into the Authority's rationale for its rates



1. Key departures from the 2010 Regulation are unexplained in the Draft Regulations or Explanatory Note:
  1. 75% reduction in the cost-oriented rate set in 2010;
  2. Reversal in the asymmetry trend announced in 2010;
  3. 375% increase in asymmetry level from Mar 2014.
2. MTN not exposed to the cost modeling used by ICASA to determine rates and targets
  1. Cost input used by ICASA for proposed 10c MTR and 19c asymmetry?
  2. Cost-benefit / proportionality analysis performed in terms of S.67.8c of the ECA?
3. MTN cannot therefore meaningfully engage with the Authority's rate proposals.
4. Without detailed costing information, draft proposals can only be discussed by reference to best practice.

# Benchmarking the proposed MTRs

## 1. Western benchmarks



Proposals will put South Africa's MTRs at the extreme end of global benchmarks

# Benchmarking the proposed MTRs

## 2. Regional benchmarks



### Regional MTRs and glide path proposals (ZAR cents)

|            | 2013      | 2014      | Glide path Target (date) |
|------------|-----------|-----------|--------------------------|
| Botswana   | 41        | 35        |                          |
| Tanzania   | 22        | 20        | 17 (2017)                |
| Kenya      | 13        | 12        |                          |
| Namibia    | 30        |           |                          |
| Nigeria    | 30        | 27        | 24 (2015)                |
| Ghana      | 21        | 18        |                          |
| <b>RSA</b> | <b>40</b> | <b>20</b> | <b>10 (2016)</b>         |

PwC BU-LRIC determinations

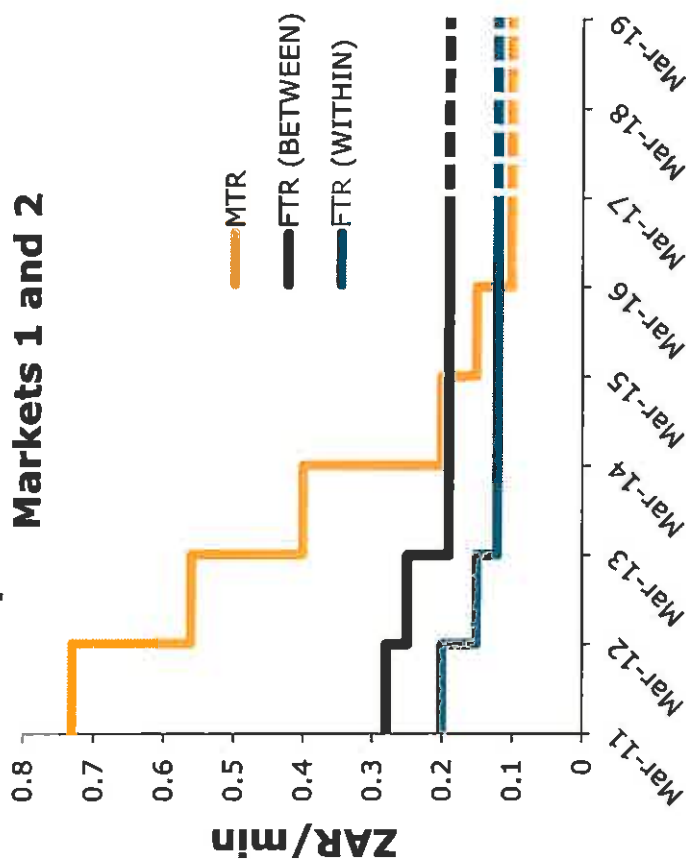
- Proposals at the extreme end of regional best practice.
- 10c is c. half the cost derived from regional BU-LRIC models
- MTN respectfully requests the Authority to share its costing study (costing inputs, costing standard, key QoS, coverage and volume assumptions).

# Benchmarking the proposed MTRs

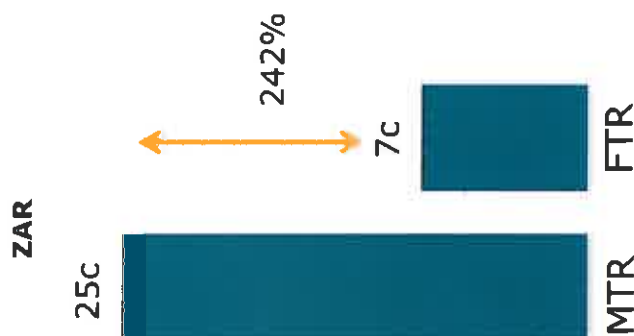
## 3. MTR / FTR comparison



**Proposed termination rates in Markets 1 and 2**



**EU benchmark<sup>1</sup>**



### GSMA cost study<sup>2</sup>

"We conclude that there are significant differences between the cost structures of mobile and fixed operators. The biggest single difference is the access network and how its costs are driven and hence should be recovered. The access network in a fixed network (predominantly the copper loops) is almost entirely driven by the number of subscribers [...]. This is not the case for mobile networks where the access network (base stations and associated equipment) is not dedicated to individual subscribers. An increase in traffic on mobile networks does require further investment in the access network."

- MTRs falling below FTRs from 1 Mar 15.
- ICASA's finding that terminating a mobile call costs less than terminating a fixed call is a world's first.
- MTN requests the Authority to provide the fixed and mobile costing studies that led to this groundbreaking conclusion

1. Source: GSMA, Comparison of fixed and mobile cost structures,



# Benchmarking the proposed Asymmetry

## 1. EU best practice



### Recommendation

**1. MTRs should be symmetrical**

### Rationale

*"Asymmetric pricing can foster inefficient behaviour and generate productive inefficiencies [...] Consequently, consumers may end up paying higher prices than would otherwise be the case in a situation of cost-based symmetric termination rates."*

**2. Any asymmetry must be justified on objective, exogenous cost factors**

*"Rewarding an operator with a price above an efficient or cost-based level can reduce its incentives to innovate and minimise costs. For example, asymmetries based on differences in dates of market entry and scale may discourage innovation and cost efficiency on the part of the later entrant/smaller operator, and may give rise to inappropriate investment incentives and inefficient entry."*

**3. And it should be limited to 3-4 years after market entry (15-20% subscriber share)**

*"The higher termination rates have to be recovered by the originating operators and will presumably be passed onto consumers in the form of higher retail prices. This effectively creates a cross-subsidy from lower-cost operators and their consumers to their less efficient rivals, thereby generating allocative-efficiency concerns."*

# Benchmarking the proposed Asymmetry

## 2. EU case study (at 1 Jan 2013)



↓ 34 countries dataset from BEREC ↓

### Symmetrical MTRs

|                |                |
|----------------|----------------|
| Austria        | Malta          |
| Belgium        | Netherlands    |
| Czech Republic | Norway         |
| Germany        | Poland         |
| Denmark        | Portugal       |
| Estonia        | Romania        |
| Greece         | Serbia         |
| Finland        | Sweden         |
| Croatia        | Slovenia       |
| Hungary        | Slovakia       |
| Ireland        | United Kingdom |
| Iceland        |                |

- 23 countries
- Average share of smallest player: **15%**

### Asymmetrical MTRs

|                                       |  |
|---------------------------------------|--|
| Bulgaria                              |  |
| Switzerland                           |  |
| Cyprus                                |  |
| Spain                                 |  |
| France <sup>1</sup>                   |  |
| Italy                                 |  |
| Lithuania                             |  |
| Luxembourg                            |  |
| Latvia                                |  |
| Former Yugoslav Republic of Macedonia |  |
| Turkey                                |  |

- 11 countries
- Average share of smallest player: **9%**
- Average asymmetry (ZAR): **4c**

1. Asymmetry removed in July 2013

|                                | Europe | RSA  | VAR                                  |
|--------------------------------|--------|------|--------------------------------------|
| Average MTR (ZAR)              | 25c    | 40c  | RSA 60% more expensive               |
| Average MTR asymmetry          | 4c     | 4c   | RSA = EU                             |
| Average FTR (ZAR) <sup>2</sup> | 7c     | 14c  | RSA 100% more expensive              |
| Average FTR asymmetry          | 0c     | 1.4c | No justification for fixed asymmetry |

Source: Body of European Regulators for Electronic Communications (BEREC), TelCom analysis

• All averages are weighted by country subscribers

• 1.3 ZAR / € exchange rate used

• 2) Weighted average between layer 1, 2, and 3 in Europe, within and between ON in RSA

# Benchmarking the proposed Asymmetry

## 3. Cell C selected benchmarks



### Cell C selected benchmarks<sup>1</sup>

#### HIGH MOBILE TERMINATION RATES

The most important reason for market failure in the SA mobile market has been high mobile termination rates, which prevented smaller operators from competing

#### 2013 MTRs in SA

- Vodacom/MTN: **R0.40**
- Cell C/Telkom Mobile: **R0.44**

#### Examples of 2013 MTRs in other countries

- France: **R0.11** (plus asymmetry)
- Turkey: **R0.16** (plus asymmetry)
- Italy: **R0.13** (plus asymmetry)
- Morocco: **R0.24**
- Nigeria: **R0.29** (plus asymmetry)
- Ghana: **R0.20** (plus asymmetry)



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### MTN commentary



Asymmetry (of **R0.04**), was **removed** in July 2013



Asymmetry is **R0.03**



Asymmetry is **R0.03**



Asymmetry of **R0.10** in 2013, **R0.05** in 2014 and **R0** in 2015.  
Applicable to players <3 years in the market or **<7.5%** market **share**



Asymmetry of **R0.18** for 24m applicable to players with **<5%** market **share**

Even by Cell C's chosen regulatory models, the Authority's asymmetry proposals are extreme (cf. size of the asymmetry, market share thresholds and / or duration).  
A regulated *increase* in asymmetry levels would also be a world's first.

## Benchmarking analysis: conclusions



1. MTN cannot meaningfully engage with the Authority's proposals until it can understand the cost inputs and costing methodology used by ICASA to reach its key determinations (rates for Market 1 and 2, basis for proposed asymmetry levels, CBA / proportionality analysis).
2. MTN however notes that:
  1. The proposed MTR target looks very aggressive, both globally and regionally;
  2. The proposed MTR target is about half the cost derived from regional BU-LRIC models;
  3. The Authority's finding that terminating a mobile call costs less than terminating a national fixed call is a world's first;
  4. The Authority's proposal to reverse its asymmetry glide path (up) is a world first;
  5. The Authority's proposed asymmetry level (19c), its proposed application to players that are 12 years in the market, and its proposed duration (*a minimum of 8 years from 1 Mar 2011*) are also unheard of.
3. MTN respectfully requests the Authority to clearly expose its reasoning, cost studies and analysis for such radical findings.





## ADDITIONAL CLARIFICATIONS SOUGHT FROM ICASA

*[Handwritten signature]*

# Use and application of the spectrum criteria



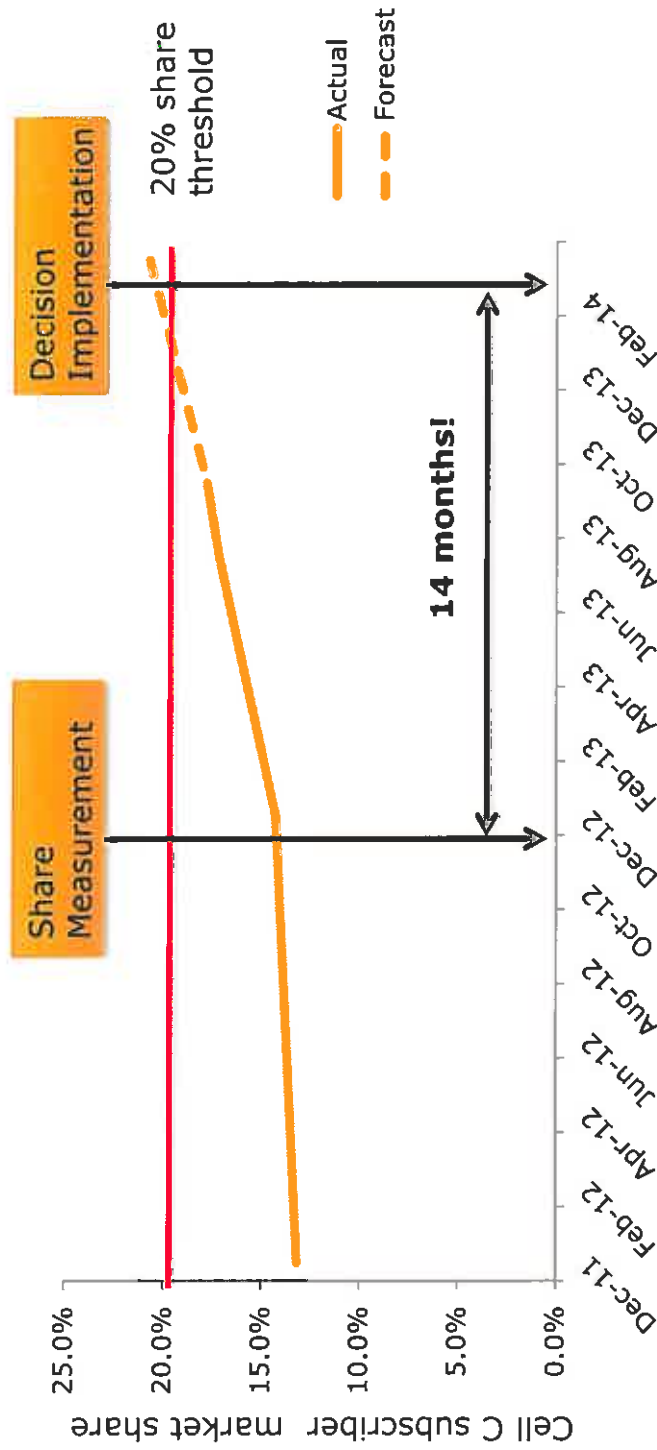
| <b>Eligibility for additional pro-competitive remedies (Reg. 7.3)</b> | “Licensees that have historically benefited from reciprocal treatment by the Authority in the allocation of spectrum”  |          |      |      |       |      |       |      |     |     |        |     |    |    |    |   |   |   |   |        |   |   |   |   |   |   |   |   |       |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |         |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |
|---|--|----------|------|------|-------|------|-------|------|-----|-----|--------|-----|----|----|----|---|---|---|---|--------|---|---|---|---|---|---|---|---|-------|---|---|---|---|---|---|---|---|-----|---|---|---|---|---|---|---|---|---------|---|---|---|---|---|---|---|---|-----|---|---|---|---|---|---|---|---|
| <b>Eligibility for asymmetric rates (Para 2.1. App. 1)</b>            | “A licensee must justify why it is adversely affected by current spectrum allocations”   |          |      |      |       |      |       |      |     |     |        |     |    |    |    |   |   |   |   |        |   |   |   |   |   |   |   |   |       |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |         |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |
| <b>RSA mobile spectrum allocations</b>                                | <p>Mobile bands (MHz):</p> <ul style="list-style-type: none"><li>3500</li><li>2600</li><li>2300</li><li>2100</li><li>1900*</li><li>1800</li><li>900</li><li>800</li></ul> <table border="1"><thead><tr><th>Operator</th><th>3500</th><th>2600</th><th>2300</th><th>2100</th><th>1900*</th><th>1800</th><th>900</th><th>800</th></tr></thead><tbody><tr><td>Telkom</td><td>100</td><td>50</td><td>50</td><td>50</td><td>0</td><td>0</td><td>0</td><td>0</td></tr><tr><td>Neotel</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td></tr><tr><td>CellC</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td></tr><tr><td>MTN</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td></tr><tr><td>Vodacom</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td></tr><tr><td>WBS</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td><td>0</td></tr></tbody></table> | Operator | 3500 | 2600 | 2300  | 2100 | 1900* | 1800 | 900 | 800 | Telkom | 100 | 50 | 50 | 50 | 0 | 0 | 0 | 0 | Neotel | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | CellC | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | MTN | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | Vodacom | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | WBS | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Operator  | 3500   | 2600     | 2300 | 2100 | 1900* | 1800 | 900   | 800  |     |     |        |     |    |    |    |   |   |   |   |        |   |   |   |   |   |   |   |   |       |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |         |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |
| Telkom  | 100  | 50       | 50   | 50   | 0     | 0    | 0     | 0    |     |     |        |     |    |    |    |   |   |   |   |        |   |   |   |   |   |   |   |   |       |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |         |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |
| Neotel  | 0  | 0        | 0    | 0    | 0     | 0    | 0     | 0    |     |     |        |     |    |    |    |   |   |   |   |        |   |   |   |   |   |   |   |   |       |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |         |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |
| CellC   | 0  | 0        | 0    | 0    | 0     | 0    | 0     | 0    |     |     |        |     |    |    |    |   |   |   |   |        |   |   |   |   |   |   |   |   |       |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |         |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |
| MTN   | 0  | 0        | 0    | 0    | 0     | 0    | 0     | 0    |     |     |        |     |    |    |    |   |   |   |   |        |   |   |   |   |   |   |   |   |       |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |         |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |
| Vodacom   | 0  | 0        | 0    | 0    | 0     | 0    | 0     | 0    |     |     |        |     |    |    |    |   |   |   |   |        |   |   |   |   |   |   |   |   |       |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |         |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |
| WBS   | 0  | 0        | 0    | 0    | 0     | 0    | 0     | 0    |     |     |        |     |    |    |    |   |   |   |   |        |   |   |   |   |   |   |   |   |       |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |         |   |   |   |   |   |   |   |   |     |   |   |   |   |   |   |   |   |

→ Can the Authority clarify which licensee(s) fulfill(s) the spectrum criteria for the purpose of its draft regulations.

# Market share measurement issues



**Cell C is on track to reach the "20%" share threshold before the Decision gets implemented**



- Asymmetry provisions locked for 5 years – based on measurements in Dec 12.
- Cell C could enjoy asymmetry even though it has reached the 20% share threshold (during the next 5 years or even before the decision is implemented!)
- MTN also seeks clarity on the calculation basis for market shares in the relevant markets (eg. revenue vs traffic, all interconnect traffic vs all terminated traffic).

# Asymmetric timescales for reviewing MTR remedies



## MTN, Vodacom

- Price control duration: Mar14-Mar16
- Subject to LRIC model output review

## Asymmetric players

- Price control duration: Mar14-Mar19
- Regardless of market developments
- Regardless of whether the scale and scope share threshold has been crossed
- Regardless of LRIC model outputs

- Substantial planning and risk asymmetries embedded in the proposals
- MTN seeks clarity on reasoning and rationale for this additional asymmetry

## Removal of 2010 pro-competitive remedies



1. Obligation to comply with Interconnection Regulations (all SMP operators)
2. Obligation to comply with Compliance Manual Regulations (all SMP operators)
3. Obligation to publish a RIO (MTN, Vodacom, Telkom)

MTN seeks clarity on the rationale for these significant changes, and how the Authority sees the interconnection markets functioning as a result.

# Overall conclusion



1. MTR cuts have had a dramatic impact on MTN, but their impact was managed through business model realignment, enabled by ICASA's glide path.
2. Current proposals abandon this successful policy, and create a R7bn "shock" to the business, impacting jobs, investment, BB for All targets and growth. This shock has already influenced investment decisions at MTN Group.
3. ICASA's radical proposals are massively misaligned with international best practice as well as any reasonable cost-based view.
4. In particular, setting mobile termination rates below fixed, increasing asymmetries by 375% and allowing established players 8 years of guaranteed asymmetry amount to a world's first.
5. ICASA needs a robust cost-based view and proportionality analysis to justify such a radical approach, or risk being challenged on the basis of irrationality.
6. MTN is keen to better understand the basis upon which the Authority reached its conclusions so it can more meaningfully and constructively engage.



THANK YOU



everywhere you go



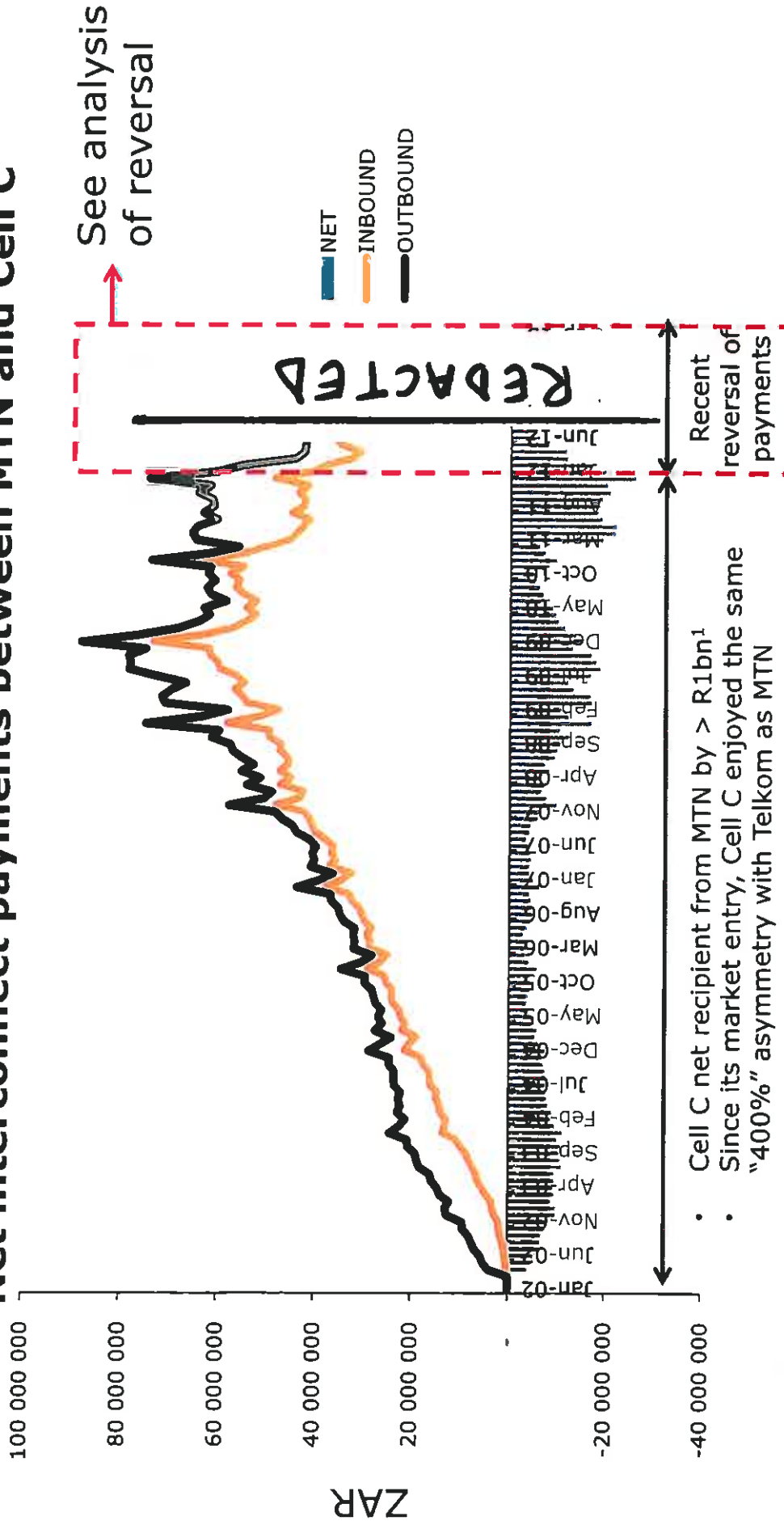
3

B

# Cell C benefited from "high MTRs" and "400% Telkom asymmetry"



## Net interconnect payments between MTN and Cell C



1. Actual cash payments affected by CTS dispute and settlement

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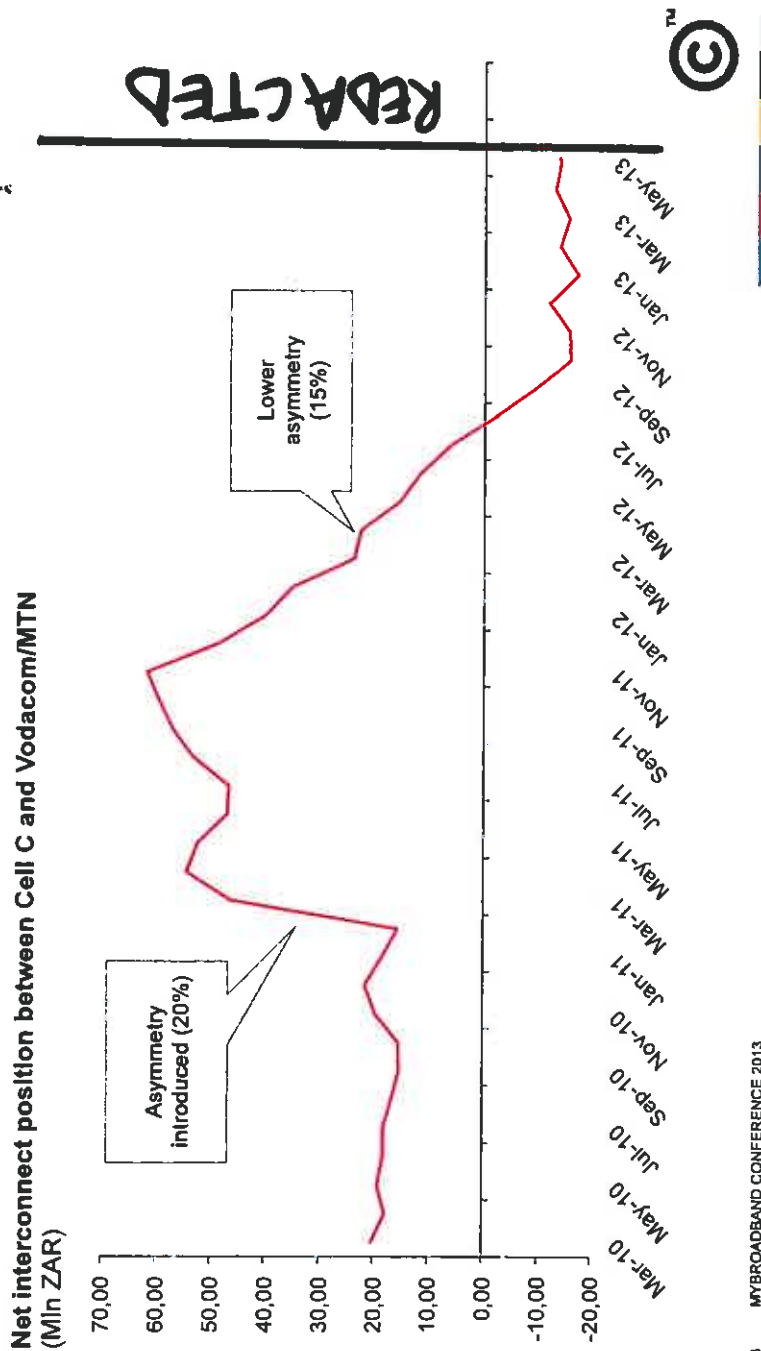


# Reasons for the reversal of payments Cell C says...



## EFFECT OF PREVIOUS REMEDIES ON CELL C INTERCONNECT POSITION

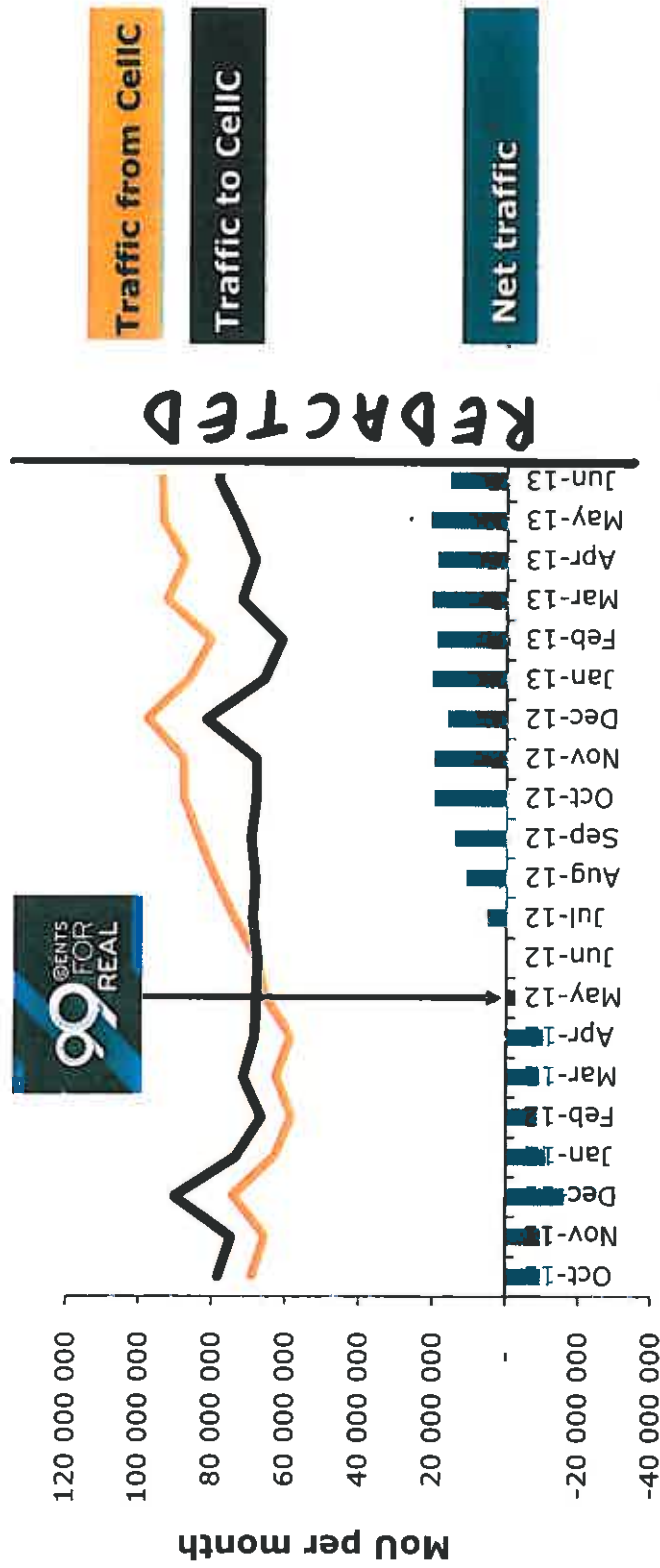
While previous remedies were introduced to help the smaller networks, they eventually damaged Cell C's interconnect position due to the skewed market



## Reasons for the reversal of payments MTN sees...



Interconnection traffic between Cell C and MTN



The reversal of interconnect traffic balances and payments is linked to **retail activities by Cell C** (99c launch), which is attracting offnet callers to its network. It has nothing to do with wholesale / MTR asymmetry %ages

# Policy decisions have a direct impact on Broadband investment and take up- US vs EU case study



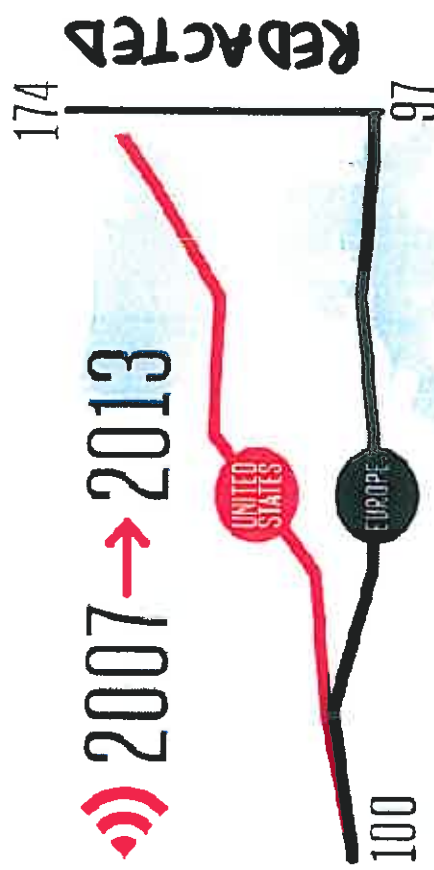
## US

- Large scale operators
- Significant consolidation activity around fibre and spectrum assets
- Early and large blocks of LTE spectrum allocated

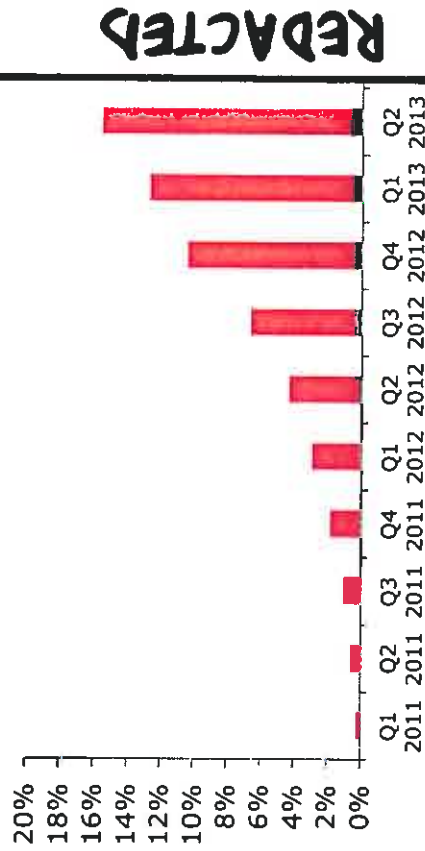
## EUROPE

- Highly fragmented markets
- Severe and continuous price interventions (LLU, MTRs, roaming)
- Cautious approach to consolidation

WIRELESS CAPEX IN EUROPE VERSUS THE U.S.  
Index 2007 = 100



LTE CONNECTIONS AS PERCENTAGE OF TOTAL  
2011-2013 PROJ., EU VERSUS U.S.



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15 November 2013

**Mr Christian Mhlanga**

Senior Manager: Markets & Competition

Independent Communications Authority of South Africa

Block A, Pinmill Farm

164 Katherine Street

Sandton

Via Email : [cmhlanga@icasa.org.za](mailto:cmhlanga@icasa.org.za)

Dear Sir,

**RE: CALL TERMINATION ONE ON ONE MEETING – 7 NOVEMBER 2013**

- 1) MTN's meeting with the Authority on 7 November 2013 with respect to the financial implications of the draft Call Termination Regulation ("the Regulation") has reference.
- 2) MTN thanks the Authority for the opportunity to discuss the content of the Regulation and in particular to air our concerns with respect to the "implications of the proposed termination regulations on [MTN's] business in South Africa", as invited to do so in your invitation letter dated 4 November 2013.
- 3) We record that MTN devoted a considerable amount of energy and resources into compiling the data that was presented to the Authority at the meeting. MTN sought to engage the Authority with actual facts and evidence on the impact of the draft proposals on its business and other SA stakeholders.

*Directors: RS Dabengwa (Chairman), Z Bulhulia (CEO)\*, R Gaseni, NWC Molope, PD Norman, S Fakie, KW Pienaar, PG Sibhya\*, BD Goschen*

*Company Secretary: MML Mokoka \*Executive*

*Reg No. 1993/001436/07*

*Vat Reg. No. 4630140434*

*Registered Financial Service Provider. FSP Reg. No. 44774*

- 4) / Despite MTN's requests at the meeting, we note the Authority will not be sharing with MTN any of the cost data or cost modelling it used to reach its proposed rates.
- 5) During the meeting, ICASA suggested MTN may have been misled by the above-mentioned letter with regards to the topics the Authority really wanted MTN to address during the 7 November meeting. ICASA suggested a new meeting should take place in the first week of December, based on a detailed agenda setting out the points the Authority really wanted to address with MTN on the 7<sup>th</sup> of November. ICASA undertook to send this invitation for such further meeting, and a detailed agenda in the first half of the week commencing 11 November. We have not yet received said invitation.
- 6) We look forward to receiving your invitation and the detailed agenda containing the issues that you wish to canvass with MTN as soon as possible, in order so that MTN can start work in earnest and be prepared to constructively engage the Authority at the meeting to be held in early December 2013 .
- 7) We hereby also confirm our intention to submit a written response to the draft Regulation.

Yours faithfully,



**GRAHAM DE VRIES**

**GENERAL MANAGER: REGULATORY AFFAIRS**

**MTN (PTY) LIMITED**





ZB11 258

**MOBILE TELEPHONE NETWORKS (PTY) LTD**  
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**22 November 2013**

**Dr Stephen Mncube**

Chairperson

ICASA

Block B, Pinmill Farm

164 Katherine Street

Sandton

Via Email : [Chairperson@icasa.org.za](mailto:Chairperson@icasa.org.za)

Attention : Christian Mhlanga

Via Email : [CMhlanga@icasa.org.za](mailto:CMhlanga@icasa.org.za)

Dear Sir,

**RE: DRAFT CALL TERMINATION REGULATIONS (GOVERNMENT GAZETTE NO. 36919  
PUBLISHED ON 11 OCTOBER 2013)**

MTN would like to thank the Authority for the opportunity to make comments on the draft Call Termination Regulations, as published in Government Notice 1018 of 2013. We submit herewith our comments for your consideration.

Please note that the MTN claims confidentiality in terms of Section 4D (1)(a) of the ICASA Act with respect to a) Paragraphs 2.1, 3.3.6, 3.3.8, 4.4, and 5.2 b) pages 36, 39, 40 and 50 of Appendix A (numbering as per "confidential" version) c) Appendix B d) Appendix D and may not be disclosed or divulged to any person as this information is in terms of Section 4D(4) financial and commercial information, "the disclosure of which is likely to cause harm to the commercial or financial interests of such person". Moreover the information relates to business plans of MTN, a licensee as envisaged in Section 4D(4)(e).

*Directors: RS Dabengwa (Chairman), Z Bulbulia (CEO)\*, R Gasani, NWC Molope, PD Norman, S Fakie, KW Pienaar, PG Sibiya\*, BD Goschen*

*Company Secretary: MML Mokoka \*Executive*

*Reg No. 1993/001436/07*

*Vat Reg. No. 4630140434*

*Registered Financial Service Provider. FSP Reg. No. 44774*

ZB

To this end, MTN has prepared two versions of its submission, clearly marked "Confidential Version" and "Public Version", only the latter may be shared by ICASA with the public.

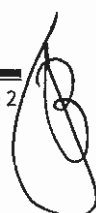
Furthermore, MTN records that it wishes to make oral presentations to the Authority should oral hearings be scheduled.

Thanking you in anticipation.

Yours faithfully,



**GRAHAM DE VRIES**  
**ACTING CHIEF CORPORATE SERVICES OFFICER**  
**MTN (PTY) LTD**



2B





## PUBLIC VERSION

**MTN'S RESPONSE TO THE ICASA DRAFT CALL TERMINATION  
REGULATION AS PUBLISHED IN GOVERNMENT GAZETTE NO 36919  
DATED 11 OCTOBER 2013**

**November 2013**

*Please note that the MTN claims confidentiality in terms of Section 4D (1)(a) of the ICASA Act with respect to a) Paragraphs 2.1, 3.3.6, 3.3.8, 4.4, 4.4.4.5 and 5.2 b) pages 36, 39, 40 and 50 of Appendix A (numbering as per "confidential" version) c) Appendix B d) Appendix D. This information may not be disclosed or divulged to any person as this information is in terms of Section 4D(4) commercial information, "the disclosure of which is likely to cause harm to the commercial or financial interests of such person". This information may not be disclosed or divulged to any person whatsoever in any form or manner whatsoever, either directly or indirectly, without the express prior written consent of MTN and all measures possible must be implemented to ensure that any employees, officers, agents, contractors and sub-contractors, representatives, consultants to whom the confidential information is disclosed do not divulge the information to any third party. The confidential information may only be used for internal purposes and processes relating to the finalisation of the Call Termination Regulation and may not be used for any other purpose whatsoever.*

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## 1 Introduction

1.1 MTN (Pty) Limited ("MTN") would like to thank the Independent Communications Authority of South Africa ("ICASA") for the opportunity to respond to the draft Call Termination Regulations as published in GN 1018 of 11 October 2013 ("the Draft Regulations") in terms of the Electronic Communications Act, No. 36 of 2005 ("the ECA"). MTN's submission will deal with the following topics:

- 1.1.1 Legal submissions.
- 1.1.2 Regulatory and economic submissions.
- 1.1.3 Public policy submissions.
- 1.1.4 Appendix A makes detailed comments on the Draft regulations and highlights key areas of departures from the 2010 Call Termination Regulations.
- 1.1.5 Appendix B provides data support for MTN's proposed arguments.
- 1.1.6 Appendix C provides a view of European regulatory best practice on asymmetry.
- 1.1.7 Appendix D contains MTN's presentation to ICASA on 7.11.2013 (one on one meeting)

## 2. Legal Submissions

- 2.1 The Draft Regulations represent a **[confidential]** for MTN over the next three years, plus a **[confidential]** competitive subsidy to Cell C over the regulatory period. Given this substantial financial and competitive impact, MTN submits that the time period for comments (30 days) and the amount of engagement (a single, 90 minute one-on-one meeting for "clarification purposes") for the consultative process are procedurally unfair.
- 2.2 Moreover, MTN has not been exposed to any of the cost modelling or cost-benefit analysis used by the Authority to derive its target termination rates and the proposed asymmetry levels. In the result, MTN cannot meaningfully engage with the Authority on the parameters that so significantly impact its business plan going forward. MTN submit that this is also procedurally unfair.

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- 2.3 The Draft Regulations represent a substantial departure from the 2010 Call Termination Regulations. The 2010 Regulations set an important regulatory precedent in relation to matters such as cost-orientation for rate-setting, managed glide path, and declining asymmetries. Any departure from these principles would have to be thoroughly explained and fully motivated by the Authority. Remarkably, however, the Draft Regulations provide no explanation, no cost-modelling evidence and no analysis to explain the 75% reduction in the rates set by the Authority in 2010, the reversal of the asymmetry glide path or the 375% increase in asymmetry value proposed from 1 March 2014. The significant departure from the 2010 Call Termination Regulations (see appendix A), coupled with the lack of any proper explanation for this change of stance, renders the Draft Regulations irrational and unreasonable.
- 2.4 MTN's detailed submissions regarding the Draft Regulations are set out in Appendix A below. For present purposes, we merely draw attention to the following by way of overview.
- 2.5 Regulation 3(a) of the Draft Regulations defines Market 1 as "the market for wholesale voice call termination services to a mobile location on the network of each ECS/ECNS licensee who offers such a service within the Republic". It is apparent from this definition that the Authority has taken the view that each licensee offering call termination services has a 100% market share in its call termination market. However, a different position is taken elsewhere in the Draft Regulations. For example, paragraph 2.2 of Appendix A provides that "a licensee qualifies ... for an asymmetric rate if it has less than 20 per cent of total terminated minutes in the relevant market as of December 2012". Since the Authority has already taken the view that each licensee has a 100% market share in its call termination market, it is difficult to see how a licensee can have a market share of less than 20%.
- 2.6 Regulation 7(1)(a) of the Draft Regulations provides that the Authority has determined "inefficient pricing" as a cause of market failure in the wholesale voice call termination market. However, the pricing that has applied in the market for the past three years has been the pricing prescribed by the Authority in the 2010 Call Termination Regulations. If the Authority is of the view that this regime has produced market failure in the form of "inefficient pricing", then it makes little sense for the Authority to perpetuate such market failure in the form of the Draft Regulations.

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- 2.7 Regulation 7(5)(a) of the Draft Regulations obliges MTN to charge the wholesale voice call termination rates specified in Table 1. MTN makes the following submissions regarding Table 1:
- 2.7.1 Paragraph 1.1 of Appendix A provides that "for the purposes of regulation 7(2)(a), 'fair and reasonable' prices are rates that are equivalent to the cost-oriented rates imposed on the licensees identified in Regulation 7(4)".
- 2.7.2 The rates in Table 1 therefore purport to be "cost-oriented".
- 2.7.3 MTN has requested the Authority to furnish it with the data and cost-modelling on which it presumably relied in order to determine that the rates in Table 1 are "cost-oriented". The Authority has declined to do so. MTN reiterates its request for this data. In the absence of such data, MTN is unable to interrogate the Authority's claim that the rates in Table 1 are "cost-oriented".
- 2.7.4 The only justification that is offered for the rates in Table 1, is contained in paragraph 5.3 of the Explanatory Note to the Draft Regulations which states that "the Authority determines that the cost of termination in Market 1 is now approximately R0.10 per minute based on, amongst others, the increase in traffic on licensees' networks". This provides a wholly inadequate basis for the Authority's conclusion that the cost of termination in Market 1 is now "approximately" 10 cents per minute. For example, what investment has the Authority assumed MTN made to support the above traffic growth on its network?
- 2.7.5 Regulation 7(5)(c) of the 2010 Call Termination Regulations required the licensees identified in regulation 7(4) to "submit regulatory financial reports in line with the format prescribed in the Accounting Separation and Cost Accounting Regulations to be prescribed by the Authority". However, the Authority has failed to prescribe the Accounting Separation and Cost Accounting Regulations envisaged by Regulation 7(5)(c). In the result, the Authority could not have been in possession of any accounting data allowing it to determine that the cost of termination in Market 1 is now "approximately" 10 cents per minute. When MTN updates old regulatory models with more recent investment data, the cost estimates it derives are substantially different from the rates proposed by the Authority. This further highlights the need to closely interrogate the cost modelling performed and rates proposed by the Authority.



- 2.7.6 Regulation 7(5)(b)(iv) of the Draft Regulations provides that the Authority “will amend existing rates [i.e. the rates in Table 1] if shown to be necessary, based on the outcomes of this model [i.e. the bottom-up LRIC cost model]”. Since the rates in Table 1 purport to be “cost-oriented”, it makes little sense for the Authority to say that it will amend those rates if the bottom-up LRIC cost model reveals that they are *not* cost-oriented after all. The Authority is required to determine that the rates in Table 1 are cost-oriented *before* it makes the Draft Regulations, not *after* it has done so. To date, MTN has not been furnished with any data indicating the basis on which the Authority has determined that the rates in Table 1 are “cost-oriented”.
- 2.8 In order to undertake a review of the pro-competitive conditions imposed upon one or more licensees, the Authority must follow the process described in section 67(8) of the ECA. The Draft Regulations fail to do so. Instead, the Draft Regulations and Explanatory Note appear to mirror the 2010 Regulations in structure and approach (definition of the relevant markets, competitive assessment, SMP determination, pro-competitive terms and conditions). They read as if the Authority were starting its market analysis afresh in terms of section 67(4) of the ECA, rather than reviewing its existing findings in terms of section 67(8).
- 2.9 Section 67(8)(c) provides: “Where, on the basis of such review, the Authority determines that the licensee to whom pro-competitive conditions apply continues to possess significant market power in that market or market segment, but due to changes in the competitive nature of such market or market segment the pro-competitive conditions are no longer proportional in accordance with subsection (7), the Authority must modify the applicable pro-competitive conditions applied to that licensee to ensure proportionality.”[our emphasis]
- 2.10 The Authority must therefore show that the dynamics in Market 1 have deteriorated to such an extent that the new, substantially more onerous remedies imposed on MTN are proportionate. It is apparent the Authority has not done this—indeed it is difficult to see how it could do so in a market where each licensee is said to have 100% market share. Even in relation to the wider retail mobile market, indicators and commentators suggest the mobile market has become *more* competitive since 2010. The Draft Regulations will nevertheless impose more onerous pro-competitive remedies imposed on MTN. This is disproportionate and inconsistent with section 67(8)(c) of the ECA.

- 2.11 In the 2010 Call Termination Regulations, the Authority determined four market failures: lack of access; discrimination; lack of transparency and inefficient pricing. However, the 2013 Draft Regulations identify a single market failure: inefficient pricing. This indicates that ICASA has formed the view that competition has become more effective in the past three years. However, the Draft Regulations fly in the face of this by imposing more onerous pro-competitive conditions on MTN. We submit that this does not comply with the requirement of proportionality in section 67(8)(c) of the ECA.
- 2.12 Paragraph 2 of Appendix A to the Draft Regulations provides that "a licensee must justify why it is adversely affected by current spectrum allocation", and that it may "qualify" for asymmetry in certain circumstances. It is not apparent from paragraph 2 to who the licensee must "justify" its spectrum deficiency or who will decide whether the licensee "qualifies" for asymmetry. This renders much of paragraph 2 unworkable.
- 2.13 Regulation 8 of the 2010 Call Termination Regulations states that a review of the call termination markets will take place *"after a minimum period of three (3) years from the publication of these regulations"* [our emphasis]. This indicates that a review in terms of Regulation 8 could only start on 29 October 2013. However, the Draft Call Termination was published on 11 October 2013. ICASA is therefore acting in a manner that is inconsistent with Regulation 8 of the 2010 Call Termination Regulations.
- 2.14 The regulatory, economic and policy arguments highlighted below indicate, in our submission, that the Authority has not properly applied its mind to the Draft Regulations. The Explanatory Note substantiates the rationale for the Draft Regulations in a manner that is inadequate and insufficient. In the absence of detailed cost data and cost modelling information from the Authority, the proposed rates can only be assessed by reference to benchmarking. Benchmark analysis reveals that the proposed rates and asymmetry are not supported by global and regional best practice nor relevant cost models (see Appendix C and B7). The Draft Regulations do not appear to consider any impact analysis. In particular, no attempt has been made to consider the proposal's financial impact on MTN and the various other stakeholders to assess their proportionality (as required by section 67(8)(c) of the ECA).
- 2.15 For all of these reasons, MTN submits that the Draft Regulations in general, and the proposed termination rates in particular, are irrational and unreasonable.



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### 3. Regulatory and economic submissions

- 3.1 The Authority finds that competition is ineffective in Markets 1 and 2, and justifies its continued imposition of pro-competitive remedies on the basis of a single market failure in the voice call termination market, namely *inefficient pricing* (see draft regulation 5 and 7.1.a). This finding is bizarre given that pricing in these markets has been regulated by the Authority since March 2011. Against this background, it is incumbent on the Authority to now show why the Draft Regulations will not create further inefficient pricing conditions in Markets 1 and 2. The Authority has made no attempt to do so.
- 3.2 The Authority provides no empirical basis for the new cost-oriented rates in Market 1 (nor the unchanged rates in Market 2). Notwithstanding its requests, MTN has not been provided with any insight into the methodology used by the Authority to compute its new cost-oriented rates, or the input cost data used to arrive at the 10c target. In this regard, MTN notes the following:
- 3.2.1 No cost data has been filed with the Authority by MTN since its last COA/CAM submission (2008) was used to set the target rate of 40c in the 2010 Regulations;
- 3.2.2 The Call Termination Questionnaire (GG 36532) focused on retail and termination traffic or revenues. This cannot provide the basis for a cost study (no cost information was requested or provided, and no cost data could possibly have been inferred from MTN's response);
- 3.2.3 MTN has invested many billions of Rands in capex in its voice network since 2010 in order to cater for voice coverage and capacity improvements. Any cost-oriented rate must take account of this incremental investment. It is not clear how the Authority could have done so;
- 3.2.4 The proposed 10c target rate is not justifiable on the basis of global or regional benchmarking (see appendix B1).
- 3.2.5 In particular, the proposed 10c rate is substantially lower than the rates derived (using the cost standard proposed by ICASA in terms of Regulation 5.b) in other regional jurisdictions: Tanzanian (17c target in 2017) and Nigerian (24c target in 2015) mobile



termination rates were both determined on the basis of a PwC BU-LRIC model. See Appendix B2.

- 3.3 The Authority provides no basis for the reversal in asymmetry trends set out in the 2010 Regulations, the unprecedented asymmetry value proposed in Market 1 (19c in 2014), or the continuation of asymmetry for another five years. See Table 1 below.

Table 1: MTR asymmetries in Market 1 (Rand/ minute, unless otherwise stated)

|        | MTN<br>MTR | Asymmetric<br>MTR | Asymmetry<br>value | Asymmetry<br>% |
|--------|------------|-------------------|--------------------|----------------|
| Mar-11 | 0.73       | 0.88              | 0.15               | 20%            |
| Mar-12 | 0.56       | 0.64              | 0.08               | 15%            |
| Mar-13 | 0.40       | 0.44              | 0.04               | 10%            |
| Mar-14 | 0.20       | 0.39              | 0.19               | 95%            |
| Mar-15 | 0.15       | 0.33              | 0.18               | 120%           |
| Mar-16 | 0.10       | 0.26              | 0.16               | 160%           |
| Mar-17 | n/a        | 0.20              | n/a                | n/a%           |
| Mar-18 | n/a        | 0.14              | n/a                | n/a%           |
| Mar-19 | n/a        | 0.10              | n/a                | n/a%           |

2010 Regulations

2013 draft Regulations

- 3.3.1 The continuation of asymmetry for another five years, its potential application to Cell C (a player that has been in the market for 12 years and has close to 20% market share – see Appendix B8) and the 375% increase in asymmetry levels, from 4c to 19c on 1 March 2014 would amount to a world first, and would run contrary to international best practice (see Appendix C). MTN submits that such a departure from ICASA's own precedents and international best practice must be thoroughly explained and justified by the Authority. To date, the Authority has offered no adequate justification at all.

- 3.3.2 The Authority made statements in the Explanatory Note accompanying the 2010 Regulations regarding the need for time- and value-limited asymmetries to ensure efficient investment, and maximize welfare. Paragraph 2.4.5 of the Explanatory Note to the 2010 Call Termination Regulations stated that *"the Authority determines that the application of asymmetric rates **for a transitory period** (own emphasis) will benefit total social welfare by stimulating competition in the respective markets, thereby benefitting end-users."* Furthermore, *"the Authority determines that it is necessary to **limit and reduce the amount of asymmetry** (own emphasis) a qualifying licensee may charge, to ensure that investment by new entrants is efficient"*.

3.3.3 These 2010 statements were aligned with international best practice on asymmetry (see Appendix C). They were captured in ICASA's proposals through the reduction of asymmetry from 20%, to 15% and finally 10% over the three steps of the previous glide path. Given these statements and this trend, market players (including beneficiaries of asymmetry) could have reasonably expected (and planned for) an end, or at least a continued decline in asymmetry levels in any future glide path imposed by the Authority.

3.3.4 Now, the Draft Regulations radically overturn ICASA's own 2010 position. MTN submits that it is incumbent on the Authority to explain and justify why it has come to such a different conclusion about the impact and welfare value of asymmetries compared to its position in 2010, and why it is proposing to depart from international best practice. The Authority has not offered any explanation or justification for this about-turn.

3.3.5 Furthermore, Draft Regulation 7.2.a, read with paragraph 1.1. of Appendix A, suggests that the cost-orientation remedy applies to all licensees. The Authority must therefore demonstrate, through cost modelling, the growing cost difference (from 95% to 160%) between MTN and asymmetric players in Market 2 to justify its proposed level of asymmetry. The Draft Regulations make no attempt to do so.

3.3.6 No cost-benefit analysis is apparent in the Draft Regulations for the [confidential] competitive subsidy handed over to Cell C over the regulatory period (see asymmetry valuation analysis in appendix B3). In fact, the proposed asymmetry is by its very nature anti-competitive in nature.

3.3.7 Cell C reports that it is currently adding 1 million subscribers a month. Its CEO is boasting 33% subscriber growth over the last 18 months: "We have grown our base by 33% to 12.3 million customers in just 18 months," *Knott-Craig told delegates at the [MyBroadband 2013] conference*<sup>1</sup>. Separately, when reporting its FY2013 results, Blue Label Telecom (a distributor of prepaid airtime for all four mobile operators) reported that Cell C had increased its prepaid revenue market share by two percentage points over the last 12 months, the only operator growing share in the period July 2012 to July 2013. See Appendix B4.

<sup>1</sup> Cell C subscriber growth soars, BusinessTech October 2013.  
<http://businesstech.co.za/news/mobile/47428/cell-c-subscriber-growth-soars/>



3.3.8 This substantial and profitable growth is taking place in a 4c asymmetry environment.

In such circumstances, increasing Cell C's asymmetry by 375% to 19c/min on 1 March 2014 and providing it with a [confidential] regulatory subsidy over the next 5 years would represent a substantial competitive leg-up to an already fast-growing competitor. This regulatory value transfer would need to be supported by a robust cost model and an understanding of its investment and competitive implications for the South African mobile market, or risk being seen as irrational and unreasonable. To date, the Authority has offered no explanation for this at all.

3.3.9 MTN notes the proposed levels of asymmetry are substantially higher than those seen in a (declining) pool of asymmetric jurisdictions in Europe, averaging 4c (see appendix B5). The Authority must show why it considers that substantially higher levels of asymmetry are required and justifiable in South Africa. The Authority has made no attempt to do so. Even by Cell C's chosen benchmarks, the Authority's asymmetry proposals can be seen as being extreme (by reference to the size of the asymmetry, the market share thresholds for determining its recipient and / or its proposed duration). See Appendix B6.

3.4 Finally, MTN submits the Authority's proposals are logically wanting in the following respects:

3.4.1 Appendix A provides that a licensee may charge asymmetrical rates if (a) it is "adversely affected by current spectrum allocation" and (b) it has "less than 20 per cent of total terminated minutes in relevant market as of December 2012". As regards (a): MTN is unable to see how Cell C, Telkom or Neotel could demonstrate any spectrum disadvantage; on the contrary, they have benefited from spectrum asymmetries – see Appendix B8. As regards (b): by virtue of the Authority's market definition, every ECN or ECNS offering call termination services in South Africa has 100% market share in the relevant market. In the result, the asymmetry provisions cannot apply to any licensee in South Africa (fixed or mobile).

3.4.2 Asymmetry is being justified by the Authority on the basis of the smaller operators' lack of scale and scope. Yet, the Authority proposes that these licensees should continue to benefit from asymmetrical rates, even if they gain more than 20% of the total terminated mobile minutes during the glide-path period. There is no reason why licensees should continue to receive asymmetrical benefits if the basis for those

benefits (i.e. lack of scale and scope) has ceased to exist. We submit that this is not "fair and reasonable".

3.4.3 MTN is unable to understand why the asymmetry thresholds (supposedly reflecting "efficient scale and scope") will change over time.

3.4.4 MTN is very concerned that eligibility for asymmetry is being determined on the basis of December 2012 market shares when the new termination rates will apply in March 2014 (a full 14 months later). This is especially relevant given that Cell C is experiencing substantial market share gains in 2013. Projecting Cell C's current growth rates suggests it may well have crossed the proposed "20% share threshold" (at least in retail subscriber terms) by 1 March 2014. See Appendix B8.

3.4.5 MTN is puzzled by the different glide path durations proposed by the Authority. The Authority is proposing to "lock" termination rates for a full six years for asymmetrical players in Market 1, but is only proposing to determine MTN's rates for 3 years, and subject to LRIC modelling outputs.

3.4.6 In terms of Draft Regulation 7(2)(a), all SMP licensees are required to charge fair and reasonable rates. Fair and reasonable rates are defined in Appendix A as "*rates that are equivalent to the cost oriented rates imposed on [MTN]*". MTN cannot understand how the glide path enjoyed by asymmetrical players in Market 1 can differ in length from the glide path applied to MTN. By virtue of the "fair and reasonable" obligation, the two glide paths are inextricably linked, both in level and duration. This also means that the output of the BU-LRIC model proposed in Regulation 7(5) necessarily affects MTN and asymmetrical players equally.

3.4.7 Given the Authority's finding that *all* voice call termination markets suffer from "inefficient pricing", MTN is surprised the Authority is proposing to cut MTN's termination rates by 50% (from 40c to 20c) in 2014, while leaving asymmetrical rates in Market 1 at 39c (just 1c off the current "inefficient price"). Even more bizarre is the Authority's proposal to keep rates in Market 2 unchanged (i.e. at their supposedly "inefficient" level). The Draft Regulations appear to be enshrining, rather than removing the current market failures in Market 2, and for asymmetrical licensees in Market 1. This is irrational and unreasonable.



3.4.8 Generally, MTN is surprised by the Authority's radically different approach to remedies in Market 1 and Market 2 (which, according to the Draft Regulations, share exactly the same competitive characteristics):

3.4.8.1 MTN has already highlighted the bizarre conclusion that despite the finding of inefficient pricing in Market 2, rates in Market 2 are proposed to remain unchanged.

3.4.8.2 MTN is equally surprised by the different approach taken by the Authority regarding asymmetry in Markets 1 and 2. Appendix A suggests that asymmetries in Market 2 remain constant at 10% during three years. This contrasts with the substantially higher and variable levels of asymmetry proposed for Market 1 (up to 160% asymmetry). MTN cannot understand the rationale for the differences in how asymmetries appear to be calculated in Market 1 and 2. MTN submits that these different approaches are arbitrary and irrational.

3.4.8.3 The radically different approach to remedies in Markets 1 and 2 produces another bizarre result. MTN notes that the Authority is proposing to set rates in Market 1 (MTRs) below rates in Market 2 (FTRs) from 1 March 2015. The Authority's finding that terminating a call on a mobile network (with a traffic sensitive "last-mile") costs less than terminating a call on a fixed network (which copper "last-mile" is largely traffic insensitive) constitutes a first in the regulatory world. MTN submits that this finding cannot be justified on the basis of a rigorous, LRIC-based cost study. In Europe, where the EU Commission recommended that termination prices be set on the basis of LRIC for both fixed and mobile termination rates<sup>2</sup>, the average MTR is 25c. The average FTR is 7c, suggesting substantial cost differences between mobile and fixed termination rates, on a LRIC basis. See appendix B9.

3.4.8.4 The GSMA published a detailed study (see Appendix E) on the reason for these cost differences. They *"conclude that there are significant differences between the cost structures of mobile and fixed*

<sup>2</sup> Commission Recommendation and Commission Staff Working Document accompanying the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU. Explanatory Note {C(2009) 3359 final}, {SEC(2009) 599}



*operators. The biggest single difference is the access network and how its costs are driven and hence should be recovered. The access network in a fixed network (predominantly the copper loops) is almost entirely driven by the number of subscribers [...]. This is not the case for mobile networks where the access network (base stations and associated equipment) is not dedicated to individual subscribers. An increase in traffic on mobile networks does require further investment in the access network*<sup>3</sup>.

3.4.8.5 MTN respectfully requests the Authority to justify how its costing models delivered the counter-intuitive finding that mobile call termination costs less than fixed call termination. The Authority has provided no such justification.

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<sup>3</sup> 1. Source: GSMA, Comparison of fixed and mobile cost structures,



## 4. Public Policy submissions

- 4.1 MTN has undertaken a detailed assessment of the likely impact of the Draft Regulations on MTN's business plan, on South African stakeholders, and on key policy objectives. This analysis was presented to the Authority on 7 November 2013, following the Authority's invitation to "share MTN's views on the implications of the proposed termination regulations on MTN's business in South Africa."
- 4.2 MTN dedicated significant resources towards researching and compiling a fact-based analysis of the impact of the 2010 glide path, and estimating the impact of the Draft Regulations on its business and South Africa, more generally. This was done with a view to assisting the Authority establish the proportionality of its proposals, by comparing the costs and likely consequences of its proposals, with the Authority's expected benefits from its intervention. To date, the latter remains unquantified by the Authority.
- 4.3 In the same way, MTN was invited to assess the impact of the proposals on its business, MTN requests a quantification of the Authority's expected benefits from its proposals, so that proportionality can be assessed in line with section 67(8)(c) of the ECA.
- 4.4 To avoid prolixity, MTN will only reproduce the key conclusions of its impact analysis below. The full presentation made to the Authority on 7 November can be found in Appendix D. In summary, MTN's key findings are:

### 4.4.1 [confidential]

### 4.4.2 [confidential]:

Table 3: [confidential]

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#### 4.4.3 [confidential]

##### 4.4.3.1 [confidential]

4.5 Given the policy implications of the above analysis, MTN again requests the Authority to set out the benefits expected from its proposals in a cost-benefit and proportionality analysis.

## 5 Conclusion

5.1 Past MTR cuts have had a dramatic impact on MTN. However, their impact was managed through business model realignment that was made possible by ICASA's managed glide path policy.

5.2 The Draft Regulations abandon this successful policy, and create a [confidential] "shock" to MTN's business that will impact on jobs, investment, Broadband for All targets and economic growth. This shock has already influenced investment decisions at MTN Group.

5.3 ICASA's radical proposals are misaligned with international best practice as well as any reasonable cost-based view, as highlighted through benchmarks.

5.4 In particular, setting mobile termination rates below fixed rates, increasing asymmetries by 375% and allowing established players 8 years of guaranteed asymmetry would amount to a first in the regulatory world. There is no basis for such bizarre regulatory outcomes.

5.5 ICASA needs a robust cost-based view and proportionality analysis to justify such a radical approach. Notwithstanding its requests, MTN has not been shown such an analysis. In the absence therefore, MTN submits that the Draft Regulations are arbitrary, irrational and unreasonable.

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**APPENDIX A – comparative analysis of the 2010 Call Termination Regulations and 2013 Draft Call Termination Regulations and detailed commentary on the Draft Call Termination Regulations.**

|                          | 2010 Call Termination Regulations   | 2013 Draft Call Termination Regulations  | MTN Comments   |
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| <b>Market definition</b> | <p>"The markets in which the Authority intends to propose impose pro-competitive measures, if such markets are found to have ineffective competition are the markets for mobile and fixed wholesale call termination services in the Republic.</p> <p>These markets are categorised according to the type of service provided to the end user and are defined as follows:</p> | <p><del>"The markets in which the Authority intends to propose impose pro-competitive measures, if such markets are found to have ineffective competition are the markets for mobile and fixed wholesale call termination services in the Republic.</del></p> <p>The markets are categorised according to the type of service provided to the end user and are defined as follows:</p> <p>Market 1: The market for wholesale</p> | <p>S. 67.6.a of the ECA provides: "When defining the relevant market or market segment the Authority must consider the non-transitory (structural, legal, or regulatory) entry barriers to the applicable markets or market segments and the dynamic character and functioning of the subject market or market segments".</p> <p>The rationale provided at paragraph 2.1. of the Draft Call Termination Explanatory Note for the unchanged</p> |



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| <p>Market 1: The market for wholesale voice call termination services to a mobile location on the network of each licensee who offers such a service within the Republic.</p> <p>Market 2: The market for wholesale voice call termination services to a fixed location on the network of each licensee who offers such a service within the Republic, consisting of:</p> <p>i) the market segment for wholesale voice call termination to a fixed location within an ON geographic area code; and</p> <p>ii) the market segment for wholesale voice call termination to a fixed location between an ON geographic area code"</p> | <p>voice call termination services to a mobile location on the network of each licensee who offers such a service within the Republic.</p> <p>Market 2: The market for wholesale voice call termination services to a fixed location on the network of each licensee who offers such a service within the Republic, consisting of:</p> <p>i) the market segment for wholesale voice call termination to a fixed location within an ON geographic area code; and</p> <p>ii) the market segment for wholesale voice call termination to a fixed location between an ON geographic area code"</p> | <p>market definition is that that there is "no technological change that changes the characteristics of termination to a mobile versus fixed location".</p> <p>This suggests that a single criteria was considered for the market review (i.e. technological change).</p> <p>The Authority does not therefore appear to have considered the additional factors highlighted in S. 67.6.a. of the ECA in reviewing market definitions.</p> <p>MTN notes the 2013 Draft Regulations now omit any reference to "the markets for mobile and fixed wholesale call termination services in the Republic". This welcome</p> |
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|  |  | <p>clarification makes it plain that the relevant markets are Markets 1 and 2, as defined.</p> <p>The market definition ("termination on the network of each ECS/ECNS licensee") necessarily implies a 100% market share in all the individual relevant markets.</p> <p>This interpretation is made plain by regulation 6: "The Authority determines that <u>each</u> ECNS and ECS licensee that offers wholesale call termination services has SMP <u>in its own market.</u>" [our emphasis]</p> <p>MTN concludes that the market definition in the Draft Regulations clarifies beyond any doubt that the</p> |
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|                    |  |           | <p>Authority is of the view that each and every licensee offering call termination services in South Africa has 100% market share in the relevant call termination markets.</p> <p>Any other conclusion would require the Authority to define a different, and wider, relevant market using the provisions in the ECA. Additionally, it would need to demonstrate the linkage of this wider with the markets defined in terms of Regulation 3.</p> |
| <b>Methodology</b> | <p>In determining the effectiveness of competition in the wholesale call termination markets, the Authority has applied the following methodology:</p> <p>a) the identification of relevant markets and their definition according to the principle of the Hypothetical Monopolist</p> | Unchanged | <p>Although the 2013 Draft Regulations suggest that the Authority has applied the same methodology as in 2010 when analysing markets and the effectiveness of competition, there is no evidence that this analysis has actually taken place.</p>   |



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|  | <p>Test, taking into the non-transitory (structural, legal, or regulatory) entry barriers to the applicable markets or market segments and the dynamic character and functioning of the subject market or market segments".</p> <p>b) the assessment of licensees market shares in the relevant markets; and</p> <p>c) the assessment on a forward looking basis of the level of competition and market power in the relevant markets.</p> | <p>The Hypothetical Monopolist Test involves understanding the impact of a 10% price increase on a hypothetical monopolist's profits, in order to infer market boundaries from supply substitutes.</p> <p>Whereas such an analysis was indeed performed (and published in GG33121) prior to the 2010 Call Termination Regulations, the 2013 Explanatory Note does not reproduce this complex analysis.</p> <p>However, it is necessary to do so when re-validating the market boundaries for Market 1 and 2. MTN requests that this analysis be made available by the Authority (if it has been done).</p> |
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|  |  |  | <p>Similarly, the Authority suggests an assessment of market shares has been performed in the relevant markets.</p> <p>The only "relevant markets" eligible for analysis are Markets 1 and 2, which, by definition ("termination on the network of each ECS/ECNS licensee") implies a 100% market share in all the individual relevant markets.</p> <p>The Explanatory Note to the Draft Regulations Explanatory Note does indeed suggest that an analysis of market shares was performed (paragraph 4.2 of Explanatory Note), but:</p> <ul style="list-style-type: none"> <li>- the Authority is clearly</li> </ul> |
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|  |  |  | <p>analysing markets that are distinct from the relevant markets defined in Regulation 3 (else all market shares should be 100%); and</p> <p>whereas the 2010 Regulations analysed market shares in terms of volumes, the Authority now appears to adopt a "revenue" market shares in the wider market it is analysing.</p> <p>MTN requests that this shift to "revenue" market shares be explained and justified. The Authority is also requested to explain how it relates to the "volume" share thresholds proposed in Regulation 7.3.b.</p> <p>Furthermore, given the importance of</p> |
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|                                     |  |   | market shares in determining which licensees may charge asymmetrical rates, MTN requests the Authority to provide guidance on how market shares are being calculated (revenue vs traffic, national interconnection minutes only, national plus international interconnection minutes, total terminated minutes, including on-net traffic, etc.). |
| <b>Effectiveness of competition</b> | "Pursuant to regulation 3, the Authority has determined that competition in the wholesale voice call termination market is ineffective." | "Pursuant to regulation 4, the Authority has determined that competition in the wholesale voice call termination market is ineffective, <u>owing to ineffective pricing.</u> " [our emphasis] | <p>The rationale offered by the Authority to support its finding of ineffective competition is both bizarre and worrying.</p> <p>It is common cause that prices in the relevant call termination markets have been regulated since March 2011 on the basis of the 2010 Call Termination Regulations.</p>   |



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|                          |  |           | <p>This suggests that the Authority has created the very market failure ("inefficient pricing") that it is now seeking to perpetuate in the Draft Regulations.</p> <p>The Authority must show why the 2013 Draft Regulations will not create further "inefficient pricing" conditions in Markets 1 and 2, as they did, by the Authority's own admission, after 2010. Unless the Authority is able to establish this, it would necessarily mean that the Draft Regulations are irrational and arbitrary.</p> |
| <b>SMP determination</b> | "The Authority determines that <u>each</u> ECNS and ECS licensee that offers wholesale call termination services has | Unchanged | ICASA's own SMP analysis indicates that each licensee has 100% market share in the relevant markets.  |



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| Pro-competitive terms and conditions | <p>SMP in its own market."</p> <p>The Authority has identified the following market failures in the respective wholesale call termination markets:</p> <ul style="list-style-type: none"> <li>a) a lack of the provision of access</li> <li>b) the potential for discrimination between licensees offering similar services</li> <li>c) a lack of transparency</li> <li>d) inefficient pricing</li> </ul> | <p>The Authority has identified the following market failures in the respective wholesale call termination markets:</p> <ul style="list-style-type: none"> <li>a) <del>a lack of the provision of access</del></li> <li>b) <del>the potential for discrimination between licensees offering similar services</del></li> <li>c) <del>a lack of transparency</del></li> <li>d) a) inefficient pricing</li> </ul> | <p>It appears that the Authority perceives substantial improvements in the competitiveness of the relevant markets as it now only identifies one out of four previous market failures. In accordance with S.67.8.c of the ECA, MTN requests the Authority to explain how it can be "proportionate" for the substantial improvements in competitive conditions highlighted in its own findings to lead to a tightening of economic remedies on MTN (termination rates cut by 75%, asymmetries increased by 375%).</p> <p>MTN has already highlighted the irony of the Authority's finding of inefficient pricing in circumstances where ICASA itself has been setting call termination prices since 1 March 2010.</p> |
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|  |  |  | MTN further highlights the irony of the Authority's proposals for a 19c asymmetry in March 2014 when it was concerned, in 2010, with potential discrimination between licensees offering similar services.  |  |
|  |  | <p>All licensees must comply with the following pro-competitive terms and conditions to overcome the market failures identified in regulation 7(1)</p> <p>a) Compliance with the provisions of the Interconnection Regulations (Government Gazette No. 33101 of 2010)</p> <p>b) Compliance with the Compliance Manual Regulations to be prescribed by the Authority</p> <p>c) Charge fair and reasonable prices for wholesale call termination consistent with</p> | <p>All licensees must comply with the following pro-competitive terms and conditions to overcome the market failures identified in sub regulation (1)</p> <p>a) <del>Compliance with the provisions of the Interconnection Regulations (Government Gazette No. 33101 of 2010)</del></p> <p>b) <del>Compliance with the Compliance Manual Regulations to be prescribed by the Authority</del></p> <p>a) Charge fair and reasonable prices for wholesale call</p> | <p>MTN notes the Authority's proposal to remove the pro-competitive remedy previously imposed on all licensees to adhere to the Interconnection Regulations (GG 33101 of 2010).</p> <p>This is a decision of major regulatory significance, yet it does not receive a mention in the Explanatory Note.</p> <p>The impact of such a proposal on the industry cannot be understated in markets where all licensees have been declared to have SMP.</p> |

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|  | Appendix B   | termination consistent with Appendix A   | <p>MTN requests the Authority to explain this decision, and how it foresees the interconnection regime going forward without this pro-competitive remedy.</p> <p>MTN also seeks clarification on whether the Interconnection Regulations will be repealed as a result of this proposal.</p> <p>Finally, MTN seeks clarification on whether the Authority will repeal the Compliance Manual Regulations.</p> |
|  | <p>The Authority has determined that additional pro-competitive terms and conditions are necessary to correct the market failures identified in regulation 7(1), which are to be imposed on the following licensees:</p> | <p>Unchanged, save that the Draft Regulations now read:</p> <p>"respective market shares of greater than 20 per cent as of December 2012."</p> | <p>MTN requests the Authority to explain what is meant by "benefiting from reciprocal treatment by the Authority in the allocation of spectrum", and to indicate which licensees fall into this category.</p>   |

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|  | <p>(a) Licensees that have historically benefitted from reciprocal treatment by the Authority in the allocation of spectrum;</p> <p>(b) Licensees that benefit from economies of scale and scope in maintaining a share of total minutes terminated in the respective markets of greater than 25 per cent as of June 2009.</p> |  | <p>It is not clear to MTN what benefit can arise from "reciprocal treatment". Indeed, MTN notes that MTN, Vodacom and Cell C have the same mobile spectrum allocations, that is:</p> <ul style="list-style-type: none"> <li>- 2*11MHz of spectrum in the 900MHz band;</li> <li>- 2*12MHz of spectrum in the 1800MHz band; and</li> <li>- 2*15MHz in the 2100MHz band.</li> </ul> <p>MTN notes that Cell C benefitted from the Authority's decision to grant 1800Mhz spectrum to Cell C whilst deciding at that time that MTN was to be excluded from a similar allocation. MTN was later granted 1800Mhz spectrum.</p> |
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|  |  |  | <p>MTN further notes that Telkom has benefited from substantially more favourable spectrum allocations than MTN (210MHz of spectrum allocated in the prime 800-3500MHz bands, vs just 76MHz allocated to MTN in the same bands). See appendix B.</p> <p>Given the above and the substantial financial and competitive impact of the proposed 19c asymmetry, MTN requires the Authority to clarify the import and application of regulation 7.3.a. It appears to have no discernible meaning.</p> <p>In addition, the Authority's market definition and SMP finding imply that all licensees have 100% market share in the relevant markets. The 20% threshold proposed in regulation</p> |
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|  |  |  | <p>7.3.b. is therefore irrelevant for all practical purposes.</p> <p>Notwithstanding the above, MTN notes that the Authority now sees “benefits from economies of scale and scope” accruing from a threshold of 20% of total terminated minutes in the relevant markets, rather than 25% in 2010.</p> <p>It further notes that this threshold reduces to 10% from 1 Mar 2019 (Appendix A, para 2.3 and 2.4).</p> <p>MTN is unable to understand how the asymmetry thresholds (supposedly reflecting “efficient scale and scope”) can fluctuate over time.</p> <p>Finally, MTN notes that the Authority</p> |
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|  |  | <p>proposes to compute its scale and scope benefits "thresholds" based on December 2012 traffic statistics.</p> <p>The new termination rates will not apply until March 2014, a full 14 months after this determination.</p> <p>Because of this time lag, MTN calculates that Cell C may benefit from a <u>[confidential]</u> asymmetry "subsidy", even though it will already have exceeded the "scale and scope" efficiency threshold determined by the Authority in terms of its Draft Call Termination (at least in subscriber terms) by 1 March 2014.</p> <p>See asymmetry calculation in Appendix B.</p> |
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|  | <p>(4)The Authority determines that the following licensees have these characteristics:</p> <p>(a) Market 1:</p> <ul style="list-style-type: none"> <li>i. MTN</li> <li>ii. Vodacom</li> </ul> <p>(b) Market 2:</p> <ul style="list-style-type: none"> <li>i. Telkom</li> </ul> | <p>(4)The Authority determines that the following licensees have the characteristics listed in sub regulation (3):</p> <p>(a) Market 1:</p> <ul style="list-style-type: none"> <li>i. MTN Pty Ltd (MTN)</li> <li>ii. Vodacom Pty Ltd (Vodacom)</li> </ul> <p>(b) Market 2:</p> <ul style="list-style-type: none"> <li>i. Telkom SA SOC Limited (Telkom)</li> </ul> | <p>MTN cannot see how the Authority has reached this conclusion, and requests the Authority to publish its reasoning in support of such a finding.</p> <p>On the face of it, the finding in regulation 7.4 is arbitrary and irrational since there is no basis for MTN and Vodacom to be singled out.</p> <p>MTN has shown that MTN, Vodacom and Cell C enjoy the same spectrum allocations (albeit at favorable financial terms for Cell C), while Telkom is enjoying substantially larger spectrum allocations than the aforementioned licensees.</p> <p>Neotel is also the recipient of a generous spectrum asymmetry (90MHz in the 800-3500MHz bands,</p> |
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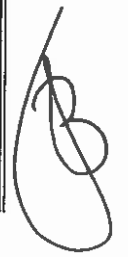
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|  |  | including the only block currently licensed in the valuable 800MHz band).  |
|  |  | MTN has also shown that, according to ICASA's own findings, all mobile licensees have 100% market share in the relevant market: "The market for wholesale voice call termination services to a mobile location on the network of each licensee who offers such a service within the Republic." |
|  |  | MTN therefore submits that all mobile licensees currently offering voice termination services (including Neotel, via its converged fixed/mobile Neosmart product), satisfy the requirements of regulation 7.3. There is simply no basis for the Authority's finding that only MTN and Vodacom  |



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|  |  |   | <p>satisfy the requirements of regulation 7.3.</p> <p>The same conclusion extends to all licensees offering services in Market 2.</p>  |
|  | <p>All licenses referred to in regulation 7(4) of these regulations must comply with the following additional pro-competitive terms and conditions</p> <p>a) publication of a Reference Interconnection Offer (RIO) [...]</p> <p>b) Price Control: Cost oriented pricing [...]</p> <p>c) Accounting separation and Cost Accounting</p> | <p>(5) Additional pro-competitive terms and conditions</p> <p>(a) Price Control: Cost oriented pricing [...]</p> <p>(b) Bottom-up LRIC cost model [...]</p> | <p>MTN notes the Authority's intention to withdraw the requirement for a RIO.</p> <p>MTN notes the substantial changes that are proposed to the additional pro-competitive remedies applicable to it.</p> <p>The impact of these changes are substantial, and profoundly affect the MTN business plan relative to the 2010 regulations:</p> <p>- the proposals represent a</p> |

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|  |  |  | <p><b>[confidential]</b> EBITDA reduction against MTN business plan over the next three years;</p> <ul style="list-style-type: none"> <li>- the proposed asymmetry levels represent a <b>[confidential]</b> regulatory subsidy to a direct competitor, further impacting MTN's business prospects as these funds are used by to gain market share;</li> <li>- the production of information for the development of a LRIC model could turn into a costly accounting separation and cost accounting exercise, as MTN needs to deploy human and, presumably, auditing resources to produce such information (at very short</li> </ul> |
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|  |  |  | notice).  |
|  |  |  | MTN requests that these changes be justified by the Authority in terms of the principle of proportionality contained in S. 67.8.c of the ECA.                           |
|  |  |  | Notwithstanding its requests, MTN has not been shown any evidence to establish that such a proportionality analysis was performed by the Authority.                     |
|  |  |  | MTN submits that, as a matter of logic, the Authority cannot come to this conclusion in a relevant market where each licensee has been found to hold 100% market share. |
|  |  |  | Even looking at the wider retail mobile market, all indicators and  |



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|  |  |  | commentators show the market is becoming <i>more</i> competitive, not <i>less</i> .  |
|  |  |  | MTN therefore submits that the Authority's proposed changes to the pro-competitive conditions imposed on MTN are disproportionate, and in conflict with S.67.8.c of the ECA.   |
|  |  |  | MTN cannot meaningfully engage with the Authority on the rates proposed in Table 1 as the draft regulation and explanatory note are silent on the methodology and cost inputs used to derive these figures. MTN repeats its request that this methodology and the relevant costing inputs used by the Authority be made available to it, so they can be properly interrogated. |



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|  |  |  | <p>MTN further notes that:</p> <ul style="list-style-type: none"> <li>- No new cost data has been filed with the Authority by MTN since its last COA/CAM submission (2008) was used to set the target rate of 40c in the 2010 Regulations;</li> <li>- The Call Termination Questionnaire (GG 36532), focused on retail and termination traffic / revenues statistics, and cannot be the basis for a cost study (since no cost information was requested or provided, and no cost data could possibly have been inferred from MTN's response);</li> <li>- MTN has invested many billions Rand of capex in its voice network since 2009 to</li> </ul> |
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|  |  |  | <p>cater for voice coverage and capacity improvements. Any cost-oriented rate must take account of this incremental investment;</p> <ul style="list-style-type: none"> <li>- The proposed 10c target rate is not justifiable on the basis of global or regional of benchmarking (see appendix B).</li> <li>- In particular, the proposed 10c rate is substantially lower than the rates derived using the cost standard proposed by ICASA in terms of Regulation 5.b): Tanzania (17c target in 2017) and Nigeria (24c target in 2015) are two regional jurisdictions that used a bottom-up, forward looking LRIC model developed by</li> </ul> |
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|  |  |  | <p>PwC.</p> <p>The rates contained in Table 2 are substantially higher than the average rate benchmarked for fixed call termination across 34 European countries (average of 7c). See Appendix B.</p> <p>MTN wishes to understand how the Authority arrived at the conclusion that the cost of terminating a call in Market 1 (10c) is lower than the cost of terminating a call in Market 2 (12-19c). Such a remarkable finding is a world first. MTN asks to be furnished with the cost modeling used to support this finding.</p> <p>Finally, MTN would like to highlight that the Authority never published the</p> |
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|                                       |  |   |   | Accounting Separation and Cost Accounting Regulations envisaged in terms of Regulation 5.c.i. of the 2010 Call Termination Regulations. MTN submits that these regulations should be published before applying new cost accounting obligations on MTN in terms of the 2013 regulations.  |
| <b>Schedule for review of markets</b> |  | <p>The Authority will review the wholesale call termination markets to which these regulations apply, as well as the effectiveness of competition and the application of pro-competitive measures in those markets, after a minimum of three (3) years from the publication of these regulations.</p> | <p>The Authority will review the wholesale voice call termination markets to which these regulations apply, as well as the effectiveness of competition and the application of pro-competitive measures in those markets, as and when necessary, based on observable trends in the defined markets.</p> | <p>The 2010 Regulations indicate that a review of the call termination markets will take place after "a minimum of three (3) years from the publication of these regulations" [our emphasis].</p> <p>Since the 2010 Call Termination Regulations were published on 29 October 2010, a review of the call termination markets could not have taken place in terms of the 2010 Call Termination Regulations until 29</p> |



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|   |  |            | <p>October 2013.</p> <p>However, the Draft Call Termination Regulations were published in on 11 October 2013.</p> <p>It is plain, therefore, that the Authority has commenced its review process prematurely and in a manner that is inconsistent with Regulation 8 of the 2010 Call Termination Regulations.</p> <p>MTN further submits that "as and when necessary" is such a vague timescale that it does not comply with the Authority's obligations under S. 67.4.f of the ECA.</p> |
| Application of the Fair and Reasonable obligation | 1.1. For the purposes of regulation 7(2)(c), "fair and reasonable" prices are rates that are equivalent to the cost-oriented | No changes | <p>Paragraph 1.1 of appendix A provides that "<u>fair and reasonable</u>" prices are <u>rates that are equivalent to the cost-oriented rates imposed on the</u></p>  |

| (appendix A) | rates imposed on the licensees identified in Regulation 7(5) (b).   | licensees identified in Regulation 7(4)". [our emphasis]   |
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|              | <p>1.2. Licensees must charge the following rates:</p> <p>1.2.1. Reciprocal rates with the rate set for MTN and Vodacom if these licensees are in Market 1;</p> <p>1.2.2. Reciprocal rates with the rate set for Telkom if these licensees are in Market 2.</p> | <p>It follows that the fair and reasonable rates that all licensees must charge in terms of Regulation 7.2.a. must be (a) equivalent to the rates charged by MTN and (b) cost oriented.</p> <p>A rate of 39c can obviously not be said to be "equivalent" to a rate of 20c.</p> <p>Notwithstanding its request, MTN has not been provided with any evidence establishing that the rates proposed in Table A1 are cost-oriented.</p> <p>MTN requests the Authority to produce the cost modelling used to derive the rates proposed in Table A1,</p> |

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|  |  | <p>and the 160% cost premium supposedly incurred by Cell C and Telkom Mobile in Market 1 in 2016.</p> <p>In the absence of this modelling evidence, MTN makes the following submissions:</p> <ul style="list-style-type: none"> <li>- The continuation of asymmetry for another five years, its potential application to Cell C (a player that has been in the market for 12 years and has close to 20% market share) and the increase in asymmetry levels amount to a world's first (see Appendix C). Such a departure from best practice must be thoroughly justified by the Authority, failing which it will be irrational and arbitrary.</li> <li>- The Authority made definitive</li> </ul> |
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|  |  |  | <p>statements in the Explanatory Note accompanying its 2010 Call Termination Regulations on the need for time- and value-limited asymmetries to ensure efficient investment, and maximize welfare (see paragraphs 2.4.5.4 and 8 in Explanatory Note, 2010). The Draft Regulations radically overturn this position. The Authority must explain and justify why it has now come to a different conclusion about the impact and welfare value of asymmetries in 2013. The Authority has not done so.</p> <p>- No cost-benefit analysis is apparent in the Draft Regulations for the <u>[confidential]</u> competitive</p> |
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|  |  |  | <p>subsidy that will be handed over to Cell C over the regulatory period (when Cell C is already adding 1 million subscribers a month and growing revenue market share in a 4c asymmetry environment).</p> <p>- The proposed levels of asymmetry are substantially higher than those seen in a (declining) pool of asymmetric jurisdictions, averaging 4c (see appendix B). The Authority must justify why it considers 375% higher levels of asymmetry are required and justifiable in South Africa. The Authority has not done so.</p> <p>MTN is also highly concerned about</p> |
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|  |  | <p>the regulatory and planning asymmetry embedded in the Draft Regulations.</p> <p>Whereas the licensees listed in Regulation 7(4)(a) see their rates set for a period of three years (subject to the outcome of the LRIC cost model (regulation 5(b)(iv)), the other licensees have their rates set (based on a December 2012 snapshot), for a period of 5-6 years, regardless of the outcome of Regulation 5(b)(iv), and regardless of their market progress (eg. even if they exceed the 20% threshold in regulation 3.b).</p> <p>All licensees are required to charge fair and reasonable rates (Regulation 7(2) a). Fair and reasonable rates are defined in Appendix A as "rates that</p> |
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|  |  | <p>are equivalent to the cost oriented rates imposed on [MTNJ]. MTN cannot therefore understand how the glide path enjoyed by asymmetrical players in Market 1 can differ in length from the glide path applied to MTN. By virtue of the "fair and reasonable" obligation, the two glide paths are inextricably linked, in level and duration. This also means that the output of the BU-LRIC model proposed in Regulation 7(5)(b) necessarily affects MTN and asymmetrical players equally.</p> <p>MTN submits that the Draft Regulations should provide the same level of planning visibility and certainty for all licensees, and the glide paths (and timeline for review) for symmetrical and asymmetrical rates</p> |
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|  |  |  | <p>should therefore be aligned.</p> <p>The Authority seeks to justify asymmetry on the basis of smaller operators' lack of scale and scope. The Authority proposes that licensees continue to benefit from asymmetrical rates, even if they breach the "efficiency" threshold within the next 5 years. MTN submits that this is irrational and unreasonable. There is no reason why licensees should continue to receive asymmetrical benefits if the alleged reason for it (lack of scale and scope) has ceased to exist.</p> |
|  | <p>1.3 Licensees not listed in Regulation 7(4) may charge higher termination rates based on the following factors:</p> | <p>2. Licensees not listed in Regulation 7(4)(a) may charge higher termination rates based on the following factors:</p> | <p>MTN has already commented on that fact that:</p> <ul style="list-style-type: none"> <li>- all licensees in Market 1 and 2 have been found to have</li> </ul>  |

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|  | <p>1.3.1. Spectrum allocation. A licensee must justify why it is adversely affected by current spectrum allocation;</p> <p>1.3.2. Economies of scale and scope based on the share of total minutes terminated in the relevant market. A licensee qualifies, for a period of 5 years from the 1st March 2014, for an asymmetric rate if it has less than 20 per cent of total terminated minutes in the relevant market as of December 2012;</p> <p>1.4 A licensee may only qualify for an asymmetric rate if either or both factors are applicable.</p> | <p>2.1. Spectrum allocation. A licensee must justify why it is adversely affected by current spectrum allocation;</p> <p>2.2. Economies of scale and scope based on the share of total minutes terminated in the relevant market. A licensee qualifies, for a period of 5 years from the 1st March 2014, for an asymmetric rate if it has less than 20 per cent of total terminated minutes in the relevant market as of December 2012;</p> <p>[...]</p> <p>2.6 A licensee may only qualify for an asymmetric rate if both factors are applicable. "</p> | <p>100% market share in the relevant markets (as defined by the Authority).</p> <ul style="list-style-type: none"> <li>- No licensee currently offering service in Market 2 could justify adverse spectrum allocation; and so</li> <li>- the provisions of paragraph 2 cannot apply to any licenses in Market 1.</li> </ul> <p>Furthermore, paragraph 2 of Appendix A to the Draft Regulations provides that "a licensee must justify why it is adversely affected by current spectrum allocation", and that it may "qualify" for asymmetry in certain circumstances. It is not apparent from paragraph 2 to who the licensee must "justify" its spectrum deficiency or who will decide whether the licensee</p> |
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|  |  | <p>"qualifies" for asymmetry, and how. This renders much of paragraph 2 unworkable.</p> <p>MTN further submits the proposed implementation of the fair and reasonable obligation, as described in appendix A is unworkable.</p> <p>Paragraph 1.2 suggests "licensees <u>must</u> charge the following rates": [our emphasis]; Draft Regulation 7(2)(a) makes clear this obligation applies to all licenses offering voice call termination services in the Republic.</p> <p>Paragraph 2 of Appendix A then suggest some licensees "<u>may</u> charge higher termination rates" [our emphasis]; this directly contradicts Paragraph 1.2, which states that all</p> |
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|  |  |  | <p>licenses must charge reciprocal rates.</p> <p>Paragraph 2.2 then suggests "a licenses qualifies, for a period of 5 years from the 1<sup>st</sup> March 2014, for an asymmetric rate [...]". The Authority does not define what "an asymmetric rate" is anywhere in the Regulations.</p> <p>Similarly, paragraph 2.4 reads: "<i>Licensees with a market share greater than 10% after five years have passed are obliged to charge symmetrical rates</i>" The Authority does not define what symmetrical rates are. Nor does the Authority specify which market the 10% market share refers to, or how this market share will be measured and assessed. Also, is the Authority suggesting a licensee with less than 10% market share five years</p> |
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|  |  | <p>from 1 March 2014 will continuously receive an asymmetry (even if its share subsequently increases above 10%)?</p> <p>Paragraph 2.3 reads: "Thereafter, a licensee qualifies for an on-going asymmetric rate of 40% [...]. Again, the Authority fails to define what an "asymmetric rate of 40%" is. If an asymmetric rate is a rate contained in Table A1, then MTN submits the Authority cannot possibly determine that an asymmetric of 40% amounts to 10c on 1 March 2019, unless the Authority already knows what MTN's rate will be on 1 March 2019. More generally, MTN submits the rates provided in Table A1 for the period 2017-19 cannot be said to be "Asymmetry Rates" unless the</p> |
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|  |  | <p>Authority has already made up its mind about the rates MTN will be charging for that period. MTN submits it would be wholly inappropriate if the Authority had already done so.</p> <p>Adding to the confusion is the fact that Table 6 of the Explanatory note suggests the maximum rate applicable from 1<sup>st</sup> March 2019 is in fact 20c,</p> <p>The application of the fair and reasonable obligation in Market 2 is equally confusing.</p> <p>Paragraph 3.1. reads: "A licensee qualifies, for a period of 5 years from the 1<sup>st</sup> March 2014, for an asymmetric rate of 10% above the rates specified in Table 2 of these Regulations [...]"</p> |
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|  |  | <p>Table 2 of the Draft Regulations contains rates for the period 1 March 2014 to 1 March 2016. MTN cannot see how an asymmetric rate of 10% applicable for five years can be derived from a table setting rates for three years only.</p> <p>MTN respectfully requests the Authority to reconsider its proposed application of the fair and reasonable obligation as currently described in Appendix A.</p> |
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**APPENDIX B – Supporting data and analysis**

***[Confidential]***

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## Appendix C - The European Commission's approach to termination rate asymmetries.

### 1. Summary

On 7 May 2009, the European Commission (EC) issued a Recommendation on the Regulatory treatment of Fixed and Mobile Termination Rates in the EU (the Recommendation)<sup>4</sup>. In it, the EC proposes harmonised principles for the setting of termination prices on a LRIC basis. It also recommends symmetry of termination rates and that any inherited asymmetry currently present in the fixed or mobile call termination markets be removed by 2012.

This is on the basis that:

- asymmetrical rates lead to consumers having to pay higher prices than in a symmetrical regime;
- allowing asymmetries on the basis of actual costs provides no incentives to become efficient (and may in fact doubly reward inefficiency via a subsidy paid by one's competitors);
- entry assistance through interconnection may promote inefficient entry, which in turn leads to higher long run prices for consumers.

The EC acknowledges that in certain exceptional cases asymmetry might be justified on the basis of objective cost differences outside the control of the operators concerned (exogenous cost differences). But it also concludes that:

- spectrum-based justifications for asymmetries go away as entrants grow share and investment moves from coverage to capacity;
- spectrum trading or the imminent release of spectrum, especially in the lower bands (digital dividend) makes any cost difference endogenous (and therefore cannot be used to justify asymmetries);
- asymmetries based on lower scale may only be considered for mobile networks (who are subject to coverage obligations) and in any case for no more than 3-4 years after

<sup>4</sup> Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC)

market entry (the time deemed necessary to reach a 15-20% market share, measured in subscribers, deemed to be the minimum efficient scale);

- the EC was not able to identify any objective cost differences justifying asymmetric rates in the fixed call termination market.

This note looks at the reasons put forward by the Commission in support of the above conclusions and draws conclusions for the proposed asymmetries in South Africa.

## 2. Rationale for symmetrical termination rates

In the Recommendation, the EC states (paragraph 7):

*"In view of the specific characteristics of call termination markets and the associated competitive and distributional concerns, the Commission has for a long time recognised that setting a common approach based on an efficient cost standard and the application of symmetrical termination rates would promote efficiency, sustainable competition and maximise consumer benefits in terms of price and service offerings."*

Key to that conclusion is the issue of efficiency incentives. At paragraph (0 of the Recommendation, the Commission states that:

*Operators which are compensated for actual costs incurred for termination have few incentives to increase efficiency.*

In the Explanatory Note accompanying the Recommendation<sup>5</sup>, the Commission further explains that (paragraph 4.2):

*"An important argument for symmetric termination rates at the level of efficient cost is that asymmetric pricing can foster inefficient behaviour and generate productive inefficiencies. Productive efficiency takes place when a good is produced at the lowest cost possible. Rewarding an operator with a price above an efficient or cost-based level can reduce its incentives to innovate and minimise costs. For example,*

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<sup>5</sup> Commission Staff Working Document accompanying the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU. Explanatory Note {C(2009) 3359 final}, {SEC(2009) 599}

*asymmetries based on differences in dates of market entry and scale may discourage innovation and cost efficiency on the part of the later entrant/smaller operator, and may give rise to inappropriate investment incentives and inefficient entry.*

*Consequently, consumers may end up paying higher prices than would otherwise be the case in a situation of cost-based symmetric termination rates. This is because the higher termination rates have to be recovered by the originating operators and will presumably be passed onto consumers in the form of higher retail prices. This effectively creates a cross-subsidy from lower-cost operators and their consumers to their less efficient rivals, thereby generating allocative-efficiency concerns.*

*Meanwhile, the less efficient operator benefits from the lower termination rates of its rivals, thus enabling it to lower its retail prices and win customers. As the subsidised operators expand, the negative impact on retail prices and consumer welfare is even greater. Given that the stated purpose of the regulation of wholesale termination charges is to prevent excessive pricing and its negative impact on consumer welfare, it is arguably counter-intuitive to apply a remedy that also generates allocative and productive inefficiencies."*

### **3. Criteria to justify asymmetries**

Despite its strong view that symmetrical rates should be adopted in the fixed and mobile markets, the Commission also recognises that in exceptional circumstances, time-limited asymmetries may be justified based on objective, quantifiable, exogenous cost differences (see paragraph 3.1.3 of the Explanatory Note):

*"The Commission recognised that in certain exceptional cases asymmetry might be justified by objective cost differences outside the control of the operators concerned. Such possible justifications could be objective network cost differences, for instance owing to cost differences between the operation of a GSM900 network and a DCS1800 network, or substantial differences in the date of market entry."*

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The Commission therefore accepts two potential, objective, exogenous cost differences to justify a time-limited departure from the symmetry principle: spectrum or inefficient scale at entry. These two factors are discussed below.

### 3.1. Spectrum-related asymmetries

The Commission acknowledges that uneven spectrum assignments may lead to higher network costs which are outside the control of the operator concerned. In its Explanatory Note, however, it highlights that such asymmetries only hold in the early years of network deployment and that spectrum liberalization or imminent release of spectrum make any on-going cost difference endogenous (and therefore not eligible to justify termination rates asymmetry). Paragraph 4.2. of the Explanatory Note states as follows

*"The extent of this [spectrum] cost disadvantage depends on a number of factors, including the regulatory situation, the nature of the demand for coverage and the geography and topology of the country. It appears that this relative cost disadvantage decreases as the market shares of the later entrants grow, increasing their capacity needs. In addition, where the spectrum assignment takes place through a market-based mechanism such as an auction or where there is a secondary market in place, any frequency-induced cost differences become more endogenously determined and are likely to be significantly reduced or eliminated. Moreover, with further spectrum liberalisation taking place, it needs to be examined whether on a forward-looking basis additional spectrum is likely to be made available through market-based assignment processes which might erode any cost differences arising from existing assignments. For example, the digital dividend is leading to the release of spectrum that is being freed up as a result of the switchover from analogue to all-digital television. The spectrum that will be released by the digital switchover is in the prime Ultra High Frequency (UHF) band. Since these bands are located in the lower spectrum range they can cover large geographical areas with relatively few base stations, offering nationwide network rollout at lower costs when compared to services delivered at higher frequencies, offering greater capacity but at shorter range."*

### 3.2. Scale-related asymmetries

In a similar fashion, the Commission recognises the issue of sub-scale entry, but warns against the on-going justification of asymmetry on this basis (paragraph 4.2 of the Explanatory Note):

*"Arguments relating to economies of scale and the higher unit costs initially incurred by new entrants have in particular been raised as possible justification for transitory asymmetry in termination rates. The Commission has previously noted in that respect that objective cost differences due to substantial differences in the date of market entry could represent a possible justification for asymmetry. At the same time, it should be borne in mind that rewarding an operator for its smaller size can give inappropriate investment signals and risks promoting inefficient entry. Such a policy may, for example, act as a disincentive to smaller operators to innovate and expand. In that respect, the Commission has previously stated that the fact an operator entered the market later and that it therefore has a smaller market share can only justify higher termination rates for a limited transitory period. The persistence of a higher termination rate would not be justified after a period long enough for an operator to adapt to market conditions and become efficient and could even discourage smaller operators from seeking to expand their market share."*

This view then focuses the debate of what is, and how to measure, minimum efficient scale. On these issues, the Commission offers the following guidance, based on the European Regulators Group (ERG) common position:

*"Following the above considerations, it is important, after having identified impediments on the retail market to market entry and expansion, to limit any asymmetries allowing new mobile entrants to recoup their higher incremental costs compared to those of a modelled efficient operator for a transitional period before a minimum efficient scale can be expected to be reached. Drawing upon the ERG Common Position on symmetry, it is reasonable to envisage a timeframe of four years (from the date of entry of the operator concerned) for phasing out asymmetries in mobile markets, based on the estimation that in the mobile market it can be expected to take three to four years to reach a market share of between 15 and 20%."*

The Commission is clear that market shares should be measured in terms that are relevant to unit costs (subscribers or traffic), not business or financial measures (eg. revenues). In fact it highlights that the ERG common position is based on a subscriber market share measure for minimum efficient scale (paragraph 5.2.4 of the explanatory note):

*"The ERG's assessment, that in a mature mobile market it can be expected to take three to four years for a new entrant to reach a market share of between 15 and 20%, involves a market share reference relating to the number of subscribers."*

### 3.3. Fixed termination asymmetries

It is clear that a spectrum-related justification for asymmetry is not open to players offering fixed call termination. But it is important to note that the Commission also concludes that entry-related, efficient scale asymmetry is not applicable to fixed networks. The Commission gives the following reasons (para.4.2 of the Recommendation):

*"As regards the extent to which new entrants might be expected to have higher unit costs than incumbents, it has been argued that this consideration is more relevant for mobile than for fixed operators. Fixed operators have the opportunity to build their networks in a particular geographic area and focus on higher-density routes. Furthermore, they can lease relevant network services from the incumbent to reduce the fixed costs of network build and thereby reduce the impact of economies of scale."*

In fact, in the Recommendation, the Commission concludes that no objective cost differences justifying a departure from the symmetry principle has been identified in the fixed termination market (paragraph 16):

*"In setting termination rates, any deviation from a single efficient cost level should be based on objective cost differences outside the control of operators. In fixed networks, no such objective cost differences outside the control of the operator have been identified."*

The Commission's conclusions are stark: while asymmetry may be justified in exceptional circumstances and for no more than 3-4 years after entry in the mobile market, there is no objective rationale for asymmetries in the fixed market.

### 3.4. Entry assistance

These stark conclusions lead the Commission to consider whether "entry assistance" is another possible justification for asymmetries. Its conclusions are equally blunt (para 4.2 of the Explanatory Note):

*"A key argument frequently used in support of the authorisation of temporary asymmetric rates in favour of later entrants, and in the absence of any verifiable objective cost differences, is that it forms part of an overall entry assistance policy which is aimed at promoting new entry and longer-term competition in fixed and mobile markets. The rationale is that allowing higher post-entry profits will encourage entry and investment and lead to more intense competition in the long run. However, it is generally accepted that such a policy may also attract inefficient entry. It may also be expected that consumers will end up paying higher retail prices than would otherwise be the case in a situation of cost-based symmetric termination rates. In addition, providing a mark-up for new entrants while regulating incumbents at cost effectively creates a cross-subsidy and can simultaneously reduce the incumbents' investment incentives.*

*In the light of the above, it is questionable whether asymmetric termination rates should be used as a form of entry assistance. On the contrary, it may be argued that symmetric price control based on an efficient-cost benchmark, rather than on the costs actually incurred by an operator, gives efficient investment incentives to firms. These considerations apply to both fixed and mobile markets."*

## 4. Outcome of the EC Recommendation

The strong EC guidance on symmetry changed the termination landscape across Europe. In mobile, historical MTR asymmetries are disappearing and most EU regulators have either enforced symmetry or provided a clear timeline for the removal of inherited asymmetries.

Out of 34 countries surveyed in January 2013 across Europe, only 11 maintained MTR asymmetries, and many of those have a clear timeline towards achieving symmetrical MTRs.

#### Mobile Termination Rates asymmetries in Europe<sup>6</sup>

| MTR symmetry achieved | Continued MTR asymmetry     |
|-----------------------|-----------------------------|
| Austria               |                             |
| Belgium               |                             |
| Czech Republic        |                             |
| Germany               |                             |
| Denmark               |                             |
| Estonia               |                             |
| Greece                | Bulgaria                    |
| Finland               | Switzerland                 |
| Croatia               | Cyprus                      |
| Hungary               | Spain                       |
| Ireland               | France <sup>7</sup>         |
| Iceland               | Italy                       |
| Malta                 | Lithuania                   |
| Netherlands           | Luxembourg                  |
| Norway                | Latvia                      |
| Poland                | Former Yugoslav Republic of |
| Portugal              | Macedonia                   |
| Romania               | Turkey                      |
| Serbia                |                             |
| Sweden                |                             |
| Slovenia              |                             |
| Slovakia              |                             |
| United Kingdom        |                             |

<sup>6</sup> Source: Termination Rates Benchmark Snapshot (as of January 2013): Integrated Report on Mobile Termination Rates, Fixed Termination Rates and SMS Termination Rates, BEREC, Jan 2013

<sup>7</sup> asymmetry was removed in July 2013





1) asymmetry was removed in July 2013

It is worth noting the weighted average asymmetry (by subscribers) in the asymmetric group can be calculated using the data provided by BEREC. It amounts to ZAR 0.04.



Appendix D

[Confidential]

Appendix E – Comparison of Fixed and Mobile Cost Structures (GSMA).

Appendix F - The impact of recent cuts in mobile termination rates across Europe (Frontier Economics).

-----END-----





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**Independent Communications Authority of South Africa**

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**Ref. No: 2/13/7/19 call termination**

Mr Graham De Vries  
General Manager: Regulatory Affairs  
MTN (Pty) Ltd  
216 14th Avenue  
Fairland  
2195

**Per email: [devrie\\_g@mtn.co.za](mailto:devrie_g@mtn.co.za)**

Dear Mr de Vries

**RE: CALL TERMINATION MARKET REVIEW**

1. We acknowledge receipt of your letter dated 15 November 2013.
2. The Authority undertook to invite MTN for another meeting following the one on one meeting held on 07 November 2013.
3. Subsequent to that, the Authority received MTN's submissions in response to the Draft Call Termination Regulations.
4. The Authority is reviewing the submissions made by MTN and all other stakeholders that the Authority has engaged with.

Dr SS Mncube (Chairperson), NA Batyi, WH Currie, JM Lebooa, N Ndhlovu, KGS Pillay,  
Dr MM Socikwa, WF Stucke (Councillors), PK Pongwana (CEO)

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5. The Authority will Inform MTN if it still requires further consultations as undertaken in our meeting of 07<sup>th</sup> November 2013.

**Yours sincerely,**

  
Nomvuyiso Batyi

**Councillor: Markets & Competition**

**Date:** 28 November 2013





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**Independent Communications Authority of South Africa**

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General Manager: Regulatory Affairs  
MTN (Pty) Ltd  
216 14th Avenue  
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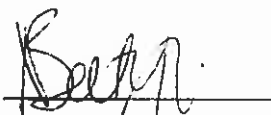
Per email: [devrie\\_g@mtn.co.za](mailto:devrie_g@mtn.co.za)

Dear Mr. de Vries

**RE: CALL TERMINATION MARKET REVIEW**

1. Following our letter dated 28 November 2013 with respect to the above.
2. The Authority has considered all inputs in this regard and deems it unnecessary to meet with MTN.

**Yours sincerely,**

  
\_\_\_\_\_  
**Nomvuyiso Batyi**

**Councillor: Markets & Competition**

**Date:** 28.01.14

Dr SS Mncube (Chairperson), NA Batyi, WH Currie, JM Lebooa, N Ndhlovu, KGS Pillay, Dr MM Socikwa,  
WF Stucke (Councillors), PK Pongwana (CEO)



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ZB13<sup>337</sup>

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**ICASA CHAIRPERSON STATEMENT REGARDING THE 2014 CALL  
TERMINATION REGULATIONS AND EXPLANATORY NOTE TO  
ACCOMPANY THE REGULATIONS**

**29 January 2014**

**Johannesburg** – Colleagues and Councillors of the Independent Communications Authority of South Africa, our new Chief Executive Officer, electronic communications industry representatives, stakeholders and members of the media present, ladies and gentlemen. My name is Nomvuyiso Batyi, and I am accompanied by Councillor William Stucke, Pieter Grootes, Christian Mhlanga and Selelo Ramohlola.

Let me, at the outset, apologise for Dr Stephen Mncube, who has been booked off-sick in the past two weeks, for not being with us today.

However, I must commend the collective will and cooperation of the ICASA Council for working as a team to ensure that we deliver on our legislative mandate on time.

Talking about the Authority's mandate, it is one of regulating the postal, broadcasting and electronic communications sector in the public interest.

Regulating in the public interest means the will and commitment to aggregate differing and sometimes conflicting societal interest, and to ensure that the public interest prevails at the end of the day.

South Africa is an emerging economy, with pockets of wealth and affluence here and there, amidst a sea of poverty, deprivation, unemployment and glaring inequalities.

A large, stylized handwritten signature in black ink, likely belonging to the Chairperson, Dr. SS Mncube.

A small, stylized handwritten mark or signature in black ink, located at the bottom right of the page.

Our role as a regulatory agency for this sector is to ensure that postal, broadcasting and electronic communications take their rightful place in the country's economy.

As we get down to the business of regulating this sector, our beacon is to attract local and foreign investors, and position this industry as a sector of choice.

We regulate to create competition and choice for the consumer and end-users so that they can get value for money and quality of service.

We regulate so that our young people can get opportunities not just to gain employment, but to generate employment and establish enterprises that would stimulate economic growth and opportunities.

As an Authority, we also regulate to ensure that the majority of our people have access to affordable electronic and ICT services wherever they are, in Orange Farm and Diepsloot, in Tsolo and Pongola, Lephalale and Springbok, Thaba Nchu, Giyani or Makhado.

This is the Authority's mandate, and I know not of any other but one of regulating in the public interest.

This mandate is captured in our organisational Strategy and Annual Performance Plans.

But specifically for today, the focus is on reducing the cost to communicate. As an Authority we embarked on this route to cut wholesale Call Termination Rates as from the 1<sup>st</sup> of March 2011 to 1<sup>st</sup> March 2013.

This initial three-year glide path, reduced mobile rates from 73 cents to 40 cents and fixed termination rates from 20 cents to 12 cents.

A special Asymmetric dispensation was also created for smaller operators to charge maximum rates to enable them to benefit from this wholesale call termination rate framework.

Today the Authority is in a position to announce and outline a further reduction in wholesale call termination rates.

These Regulations will be effective as of the 1<sup>st</sup> March 2014, and will be published shortly.



The Authority has determined the following wholesale voice call termination rates for Market 1 (Mobile) and Market 2 (Fixed)

*Table 1: Wholesale voice call termination rates to a mobile location (Market 1)*

| Period       | Rate   |
|--------------|--------|
| 1 March 2014 | R 0.20 |
| 1 March 2015 | R 0.15 |
| 1 March 2016 | R 0.10 |

*Table 2: Wholesale Voice Call Termination Rates to a Fixed Location (Market 2)*

| Period       | WON   | BON   |
|--------------|-------|-------|
| 1 March 2014 | R0.12 | R0.16 |
| 1 March 2015 | R0.12 | R0.12 |
| 1 March 2016 | R0.10 | R0.10 |

In addition, the Authority has determined the following asymmetric regimes for Market 1 (Mobile) and Market 2 (Fixed)

*Table 3: Maximum Asymmetry Rate for Market 1 (Mobile)*

|               | Maximum Rate |
|---------------|--------------|
| 01 March 2014 | R 0.44       |
| 01 March 2015 | R 0.42       |
| 01 March 2016 | R 0.40       |
| 01 March 2017 | R 0.20       |

*Table 4: Maximum Asymmetry Rate for Market 2 (Fixed)*

| Period       | WON   | BON   |
|--------------|-------|-------|
| 1 March 2013 | R0.13 | R0.21 |
| 1 March 2014 | R0.13 | R0.21 |
| 1 March 2015 | R0.13 | R0.13 |
| 1 March 2016 | R0.13 | R0.13 |



|              |       |       |
|--------------|-------|-------|
| 1 March 2017 | R0.13 | R0.13 |
|--------------|-------|-------|

The Authority holds that the new regulations will go a long way in :

- Ensuring a free flow to retail process
- that although the Asymmetry is high for a limited period, it is intended to provide a conducive environment for smaller operators to invest in infrastructure; and that
- the Authority takes a dim view of any price discrimination.

Finally, let me point out that the Authority has developed a five-year Strategy for 2014-2018, and would like to share this and engage with operators, licensees and stakeholders.

This will be another discussion for another day, in the near future. A Stakeholders Meeting is indeed on the cards, and you will be informed and invited in due course.

Thank you very much for your attention. We have a panel of Councillors and technical experts present here, who are ready to respond to your questions and concerns.

You can also direct enquiries regarding the Final Call Termination Regulations and the Explanatory Note should be directed to Christian Mhlanga on (011) 566 3637 or [CMhlanga@icasa.org.za](mailto:CMhlanga@icasa.org.za) and Mankopane Nkopane on (011) 566 3639 [MNkopane@icasa.org.za](mailto:MNkopane@icasa.org.za)

Enkosi, ndiyabulela, ke a leboga.



# **Termination Rates Benchmark Snapshot (as of January 2013)**

## **Integrated Report on Mobile Termination Rates, Fixed Termination Rates & SMS Termination Rates**

**June 2013**



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6. ANNEX ..... 18



## 1. Introduction

The present document is the 2nd Integrated Report on Termination Rates in Europe, providing an overview of Mobile Termination Rates (MTR), Fixed Termination Rates (FTR) and SMS Termination Rates (SMS TR) per country based upon the results of a request for information sent to all NRAs referring to data as of 1st January 2013.

The aim of this report is thus to offer a picture of the rates for interconnection and termination rates in mobile, fixed and SMS in Europe.

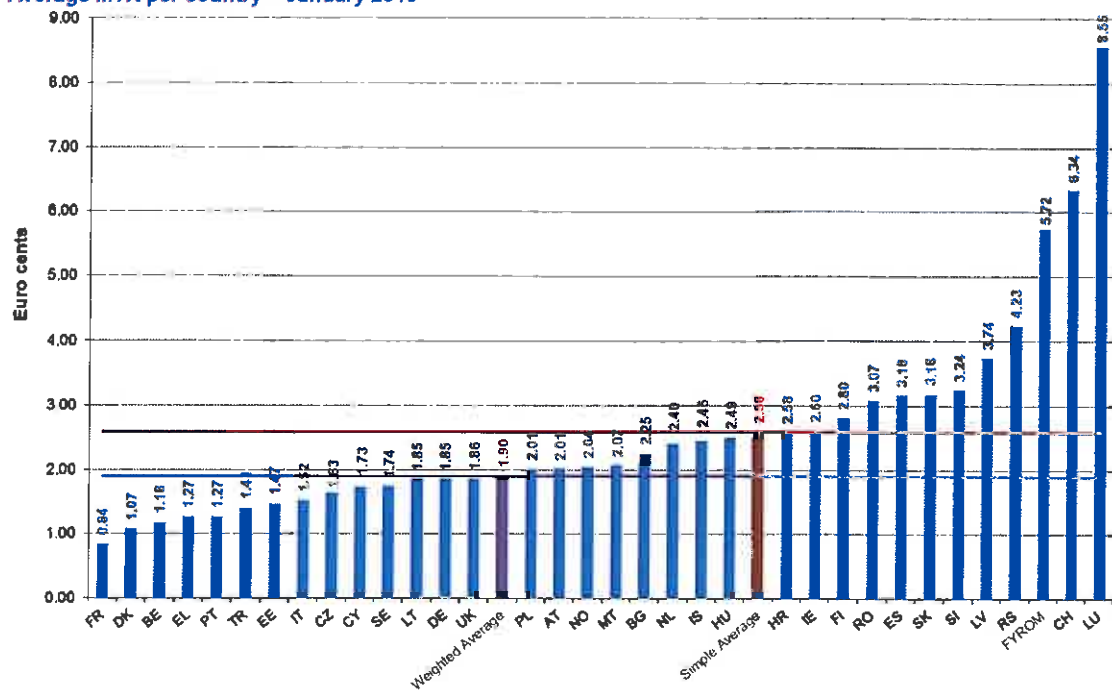
Regarding the monitoring of MTR, BEREC continues the work started by ERG in 2004 with a twice yearly overview report. Regarding the monitoring of SMS TR and FTR, BEREC started its own data collection in 2011 with the aim of facilitating this benchmarking comparison to NRAs.

As of January 2013, this is the situation of Termination Rates in Europe:

- With regard to MTR, the simple average for EU stands at 2.5793 € cents per minute, whereas EU weighted average is estimated in 1.8979 € cents per minute.
- Regarding domestic SMS TR, the EU simple average is placed in 2.87 € cents per SMS, whereas the weighted average is reported to be 2.73 € cents per SMS.
- Lastly, concerning Fixed Termination Rates (FTR), they were analysed taking into account the three main levels of fixed interconnection layers and two types of interconnection (time and capacity). EU average for Layer 1 was reported to be 0.50€ cents per minute. Regarding layer 2 and 3, EU average stands at 0.60€ cents per minute and 0.82€ cents per minute, respectively.

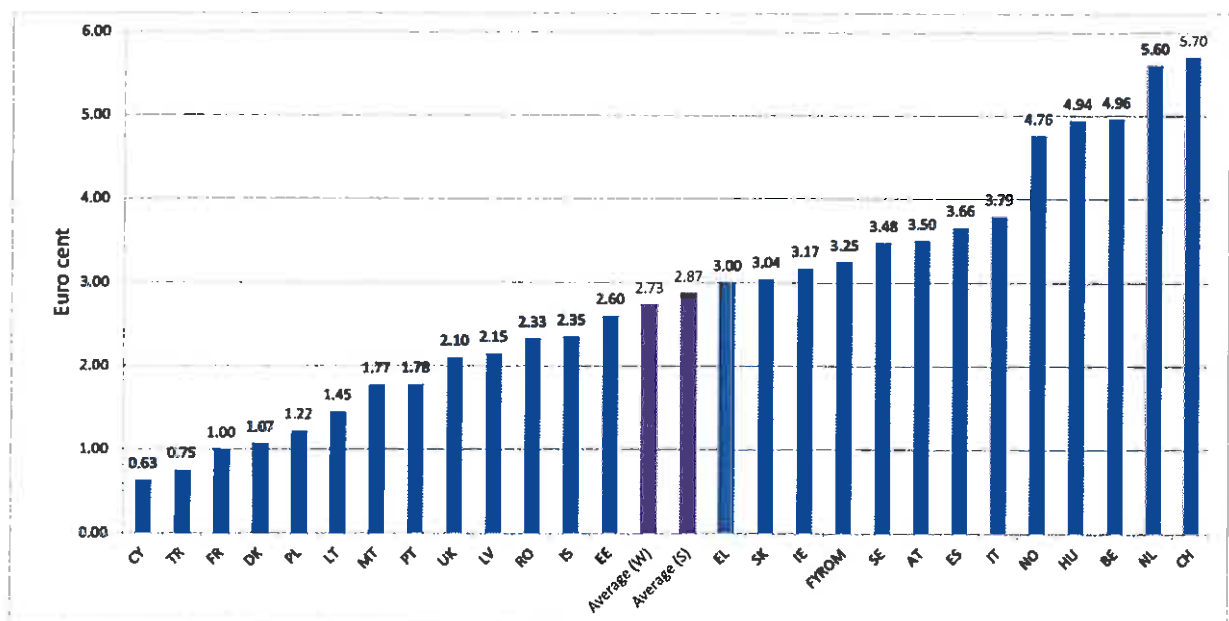
BoR (13) 60

2. Charts:  
Average MTR per country – January 2013



BoR (13) 60

SMS TR per country – January 2013



BoR (13) 60

### FTR: Effective weighted per minute interconnection rate-Incumbent's fixed network (Layer 1, Layer 2, Layer 3)

In this section the effective average per minute price of each layer of interconnection service provided by each incumbent is presented, together with the simple average for Europe (horizontal line).

For those countries that only regulate interconnection with the TBI model, the average price is used. Note that this average (per minute) price is the weighted average between the peak and off-peak rates, where the weights used are based on the distribution of traffic between both time periods.

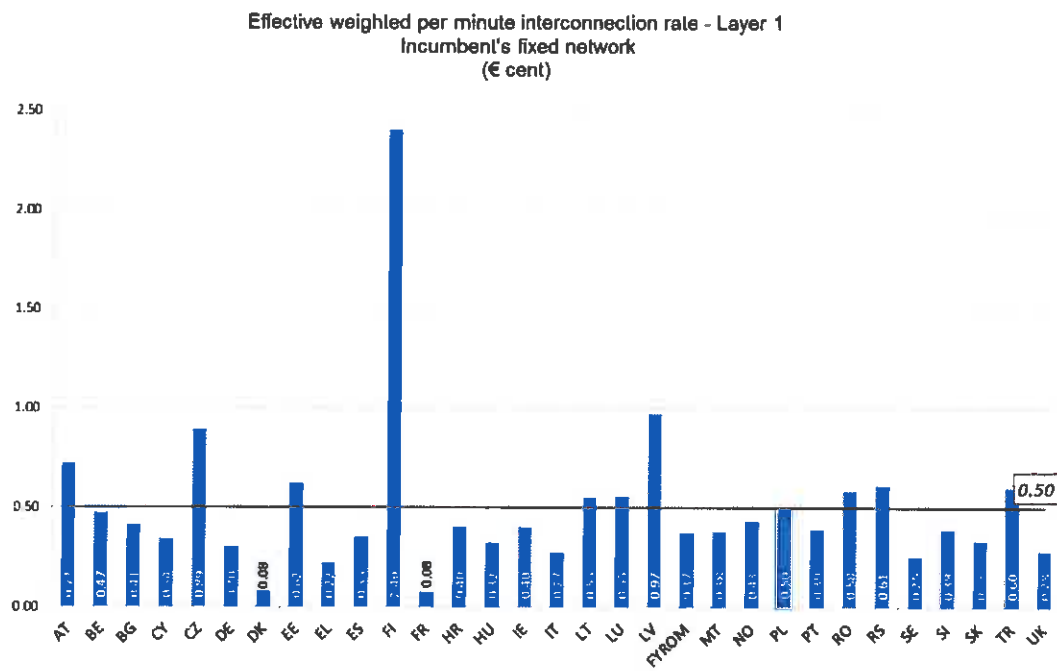
For those countries that have both the TBI and the CBI regimes given the different tariff outlays, a weighted average between the CBI and the TBI regime is provided.

In the next three graphs the effective weighted per minute interconnection rate for the incumbents is depicted for each country. Note that these are regulated rates and have been constructed as a weighted average, taking the different components into account:

- (1) Peak / off-peak rates for interconnection rates based on time (per minute charges)
- (2) Set-up charge, distributed over a 3 minutes /average duration) call, for the time based interconnection model
- (3) Capacity based (CBI) and time based (TBI) interconnection charges, where the per circuit price has been translated into an average per minute price taking into account the price of the 2 Mbps circuit, on the one side, and the effective volume of minutes used by an average 2 Mbps circuit over the year.

For each of these components, the weights used are based on the proportion of traffic at the wholesale level that applies to one or the other mode of interconnection (peak/ off-peak, capacity vs time based).

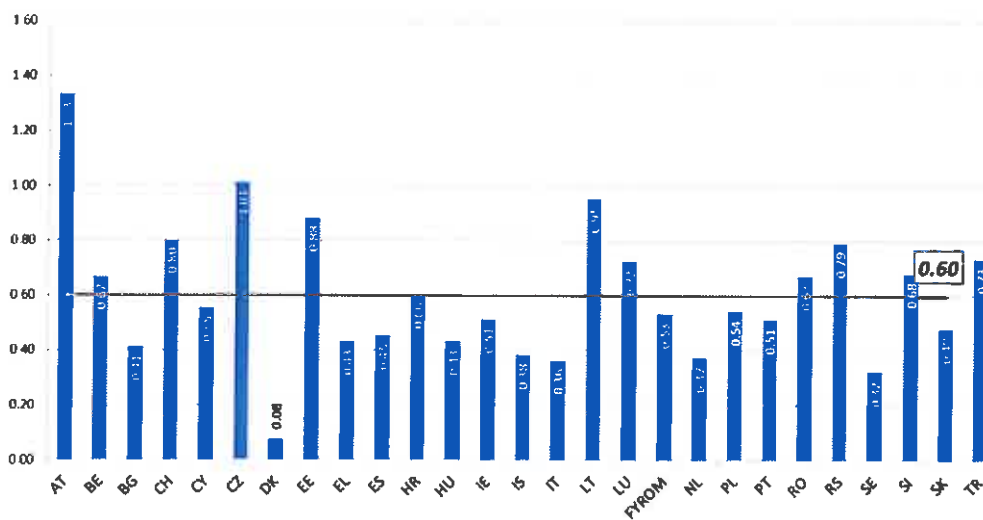
BoR (13) 60





BoR (13) 60

Effective weighted per minute interconnection rate - Layer 2  
Incumbent's fixed network  
(€ cent)



BoR (13) 60

Effective weighted per minute interconnection rate - Layer 3  
Incumbent's fixed network  
(€ cent)



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### 3. MTR

#### Assumptions

The assumptions used in the benchmark exercise are the following:

- Most countries do not differentiate between MTR for fixed-to-mobile and mobile-to-mobile. For countries that differentiate, fixed-to-mobile charges have been used.
- In order to obtain a homogenous comparison, a three-minute average call duration has been assumed; set-up charges are accounted for by the standard formula.
- Operators with a market share below 1,5% have been excluded from the MTR average calculation.
- Only nominal tariffs are represented in the report, defining them as "The price (in euro/minute) set out by the regulator that represents the maximum price per minute which operators may charge each other (without any adjustment for purchasing power parity or real effects –inflation)."
- For those countries that have not set an average tariff and, additionally, apply distinct rates –one for the peak period, and another one for off-peak period-, a total average tariff per operator has been calculated with the distribution of peak and off-peak traffic.
- Average MTR per country have been obtained by weighting the average MTR of each operator by its market share, measured in terms of subscribers. Two European averages have been calculated: a simple average and a weighted average, the latter weighting each country's average with the share of the country's subscribers (total subscribers per country / total European subscribers). In the case of the European weighted average, only the countries that reported the number of subscribers are taken into account.
- The MTR charges are those applicable on 1st January 2013, though assumptions to calculate average charges (for example number of subscribers) may not be as of 1st July 2013.
- For non-Euro countries, the average exchange rate for the second quarter of the year, Q4 2012<sup>1</sup> was used for the calculation of MTR. A list of the exchange rates used is reported in the Annex

<sup>1</sup> European Central Bank website:

<http://sdw.ecb.europa.eu/browseSelection.do?DATASET=0&sf1=4&FREQ=Q&sf3=4&CURRENCY=&node=2018794>

## Average MTR per country as of January 2013

| Country                  | Average MTR per country (€cent) |          |        |
|--------------------------|---------------------------------|----------|--------|
|                          | Peak                            | Off-peak | Total  |
| AT                       | 2.0100                          | 2.0100   | 2.0100 |
| BE                       | 1.1800                          | 1.1800   | 1.1800 |
| BG                       | 2.3519                          | 1.9940   | 2.2523 |
| CH                       | 6.3409                          | 6.3409   | 6.3409 |
| CY                       | 1.7293                          | 1.7293   | 1.7293 |
| CZ                       | 1.6291                          | 1.6291   | 1.6291 |
| DE                       | 1.8500                          | 1.8500   | 1.8500 |
| DK                       | 1.0725                          | 1.0725   | 1.0725 |
| EE                       | 1.4700                          | 1.4700   | 1.4700 |
| EL                       | 1.2690                          | 1.2690   | 1.2690 |
| ES                       | 3.1739                          | 3.1739   | 3.1739 |
| FI                       | 2.8000                          | 2.8000   | 2.8000 |
| FR                       | 0.8394                          | 0.8394   | 0.8394 |
| HR                       | 2.5804                          | 2.5804   | 2.5804 |
| HU                       | 2.4925                          | 2.4925   | 2.4925 |
| IE                       | 3.3532                          | 1.8474   | 2.6003 |
| IS                       | 2.4492                          | 2.4492   | 2.4492 |
| IT                       | 1.5206                          | 1.5206   | 1.5206 |
| LT                       | 2.0244                          | 1.0137   | 1.8489 |
| LU                       | 9.1750                          | 7.9300   | 8.5525 |
| LV                       | 3.7377                          | 3.7377   | 3.7377 |
| FYROM                    | 5.7244                          | 5.7244   | 5.7244 |
| MT                       | 2.0700                          | 2.0700   | 2.0700 |
| NL                       | 2.4000                          | 2.4000   | 2.4000 |
| NO                       | 2.0413                          | 2.0413   | 2.0413 |
| PL                       | 2.0086                          | 2.0086   | 2.0086 |
| PT                       | 1.2700                          | 1.2700   | 1.2700 |
| RO                       | 3.0700                          | 3.0700   | 3.0700 |
| RS                       | 4.2298                          | 4.2298   | 4.2298 |
| SE                       | 1.7395                          | 1.7395   | 1.7395 |
| SI                       | 3.2400                          | 3.2400   | 3.2400 |
| SK                       | 3.1800                          | 3.1800   | 3.1800 |
| TR                       | 1.4052                          | 1.4052   | 1.4052 |
| UK                       | 1.8578                          | 1.8578   | 1.8578 |
| Average (S)              | 2.7056                          | 2.5808   | 2.5775 |
| Average (W) <sup>2</sup> | 1.9006                          | 1.8881   | 1.8978 |

<sup>2</sup> The Weighted Average does not take into account countries not providing the total number of subscribers.

## Average MTR per operator as of January 2013

| Country         | Operator                             | Average effective prices (€cent) |          |        | Subscribers  | Country total subscribers | Market Share % |
|-----------------|--------------------------------------|----------------------------------|----------|--------|--------------|---------------------------|----------------|
|                 |                                      | Peak                             | Off-peak | Total  |              |                           |                |
| AT              | A1Telekom Austria                    | 2.0100                           | 2.0100   | 2.0100 | 6,140,299    | 13,381,703                | 45.89%         |
|                 | T-Mobile                             | 2.0100                           | 2.0100   | 2.0100 | 4,143,657    |                           | 30.97%         |
|                 | H3G (including Orange <sup>3</sup> ) | 2.0100                           | 2.0100   | 2.0100 | 3,097,747    |                           | 23.15%         |
| BE <sup>4</sup> | Belgacom                             | 1.1800                           | 1.1800   | 1.1800 | 5,129,000    | 12,879,098                | 39.82%         |
|                 | Mobistar                             | 1.1800                           | 1.1800   | 1.1800 | 4,839,698    |                           | 37.58%         |
|                 | KPN Group Belgium                    | 1.1800                           | 1.1800   | 1.1800 | 2,910,400    |                           | 22.60%         |
| BG <sup>5</sup> | Mobiltel                             | 2.3519                           | 1.9940   | 2.2557 | confidential | 10,780,732                | 43.26%         |
|                 | Cosmo Bulgaria Mobile                | 2.3519                           | 1.9940   | 2.2494 | confidential |                           | 36.37%         |
|                 | BTC                                  | 2.3519                           | 1.9940   | 2.2503 | confidential |                           | 20.37%         |
| CH              | Swisscom                             | 5.7947                           | 5.7947   | 5.7947 | 6,150,874    | 9,873,488                 | 62.30%         |
|                 | Sunrise                              | 7.2434                           | 7.2434   | 7.2434 | 2,141,460    |                           | 21.69%         |
|                 | Orange                               | 7.2434                           | 7.2434   | 7.2434 | 1,581,154    |                           | 16.01%         |
| CY              | MTN Cyprus Ltd                       | 1.7090                           | 1.7090   | 1.7090 | 312,782      | 1,123,570                 | 27.84%         |
|                 | Cyta                                 | 1.7090                           | 1.7090   | 1.7090 | 789,527      |                           | 70.27%         |
|                 | PRIMETEL PLC                         | 2.7840                           | 2.7840   | 2.7840 | 21,261       |                           | 1.89%          |
| CZ              | T-Mobile                             | 1.6291                           | 1.6291   | 1.6291 | confidential | confidential              | 39.24%         |
|                 | Telefónica                           | 1.6291                           | 1.6291   | 1.6291 | confidential |                           | 36.98%         |
|                 | Vodafone                             | 1.6291                           | 1.6291   | 1.6291 | confidential |                           | 23.65%         |
|                 | MobilKom                             | 1.6291                           | 1.6291   | 1.6291 | confidential |                           | 0.12%          |
| DE              | T-Mobile                             | 1.8500                           | 1.8500   | 1.8500 | 36,568,000   | 113,158,000               | 32.32%         |
|                 | Vodafone                             | 1.8500                           | 1.8500   | 1.8500 | 33,890,000   |                           | 29.95%         |
|                 | E-plus                               | 1.8500                           | 1.8500   | 1.8500 | 23,400,000   |                           | 20.68%         |
|                 | O2Telefónica                         | 1.8500                           | 1.8500   | 1.8500 | 19,300,000   |                           | 17.06%         |
| DK              | TDC                                  | 1.0725                           | 1.0725   | 1.0725 | 3,112,178    | 7,053,684                 | 44.12%         |
|                 | Telia                                | 1.0725                           | 1.0725   | 1.0725 | 1,281,620    |                           | 18.17%         |
|                 | Telenor                              | 1.0725                           | 1.0725   | 1.0725 | 1,812,337    |                           | 25.69%         |
|                 | H3G                                  | 1.0725                           | 1.0725   | 1.0725 | 438,619      |                           | 6.22%          |
| EE              | EMT                                  | 1.4700                           | 1.4700   | 1.4700 | 867,754      | 2,070,547                 | 41.91%         |
|                 | Elisa                                | 1.4700                           | 1.4700   | 1.4700 | 638,965      |                           | 30.86%         |
|                 | Tele2                                | 1.4700                           | 1.4700   | 1.4700 | 563,828      |                           | 27.23%         |
| EL              | Cosmote                              | 1.2690                           | 1.2690   | 1.2690 | confidential | confidential              | confidential   |
|                 | Vodafone                             | 1.2690                           | 1.2690   | 1.2690 | confidential |                           | confidential   |
|                 | Wind                                 | 1.2690                           | 1.2690   | 1.2690 | confidential |                           | confidential   |
| ES              | TME                                  | 3.1600                           | 3.1600   | 3.1600 | 18,439,125   | 50,662,531                | 36.40%         |
|                 | Vodafone                             | 3.1600                           | 3.1600   | 3.1600 | 13,162,284   |                           | 25.98%         |
|                 | Orange                               | 3.1600                           | 3.1600   | 3.1600 | 10,974,239   |                           | 21.66%         |
|                 | Xfera                                | 3.3600                           | 3.3600   | 3.3600 | 3,249,636    |                           | 6.41%          |

<sup>3</sup> AT: The take over of Orange by H3G was cleared by the European Commission in Decemebr 2012.<sup>4</sup> BE: subscribers including M2M<sup>5</sup> BG: Number of mobile voice subscribers (excl. data SIMs) as of 31.12.2012

|                 |                       |         |        |         |              |            |        |
|-----------------|-----------------------|---------|--------|---------|--------------|------------|--------|
| FI              | DNA                   | 2.8000  | 2.8000 | 2.8000  | n.a.         | n.a.       | n.a.   |
|                 | Elisa                 | 2.8000  | 2.8000 | 2.8000  | n.a.         |            | n.a.   |
|                 | TeliaSonera           | 2.8000  | 2.8000 | 2.8000  | n.a.         |            | n.a.   |
|                 | AMT                   | 2.8000  | 2.8000 | 2.8000  | n.a.         |            | n.a.   |
| FR <sup>6</sup> | Orange                | 0.8000  | 0.8000 | 0.8000  | confidential | 70,469,000 | -      |
|                 | SFR                   | 0.8000  | 0.8000 | 0.8000  | confidential |            | -      |
|                 | Bouygues Telecom      | 0.8000  | 0.8000 | 0.8000  | confidential |            | -      |
|                 | Free Mobile           | 1.1000  | 1.1000 | 1.1000  | confidential |            | -      |
|                 | Omea Telecom          | 1.1000  | 1.1000 | 1.1000  | confidential |            | -      |
|                 | Lyca Mobile           | 1.1000  | 1.1000 | 1.1000  | confidential |            | -      |
| HR <sup>7</sup> | HT                    | 2.5804  | 2.5804 | 2.5804  | 2,442,882    | 5,262,986  | 46.42% |
|                 | VIPnet                | 2.5804  | 2.5804 | 2.5804  | 2,054,650    |            | 39.04% |
|                 | Tele2                 | 2.5804  | 2.5804 | 2.5804  | 765,454      |            | 14.54% |
| HU              | T-Mobile              | 2.4925  | 2.4925 | 2.4925  | 5,319,588    | 11,579,425 | 45.94% |
|                 | Telenor               | 2.4925  | 2.4925 | 2.4925  | 3,620,886    |            | 31.27% |
|                 | Vodafone              | 2.4925  | 2.4925 | 2.4925  | 2,638,951    |            | 22.79% |
| IE <sup>8</sup> | Vodafone              | 2.6000  | 2.6000 | 2.6000  | n.a.         | n.a.       | 44.6%  |
|                 | O2                    | 3.6500  | 1.4400 | 2.6000  | n.a.         |            | 27.2%  |
|                 | Meteor                | 4.2500  | 1.0000 | 2.6000  | n.a.         |            | 18.0%  |
|                 | Hutchinson 3G         | 4.4000  | 1.0000 | 2.6000  | n.a.         |            | 9.0%   |
|                 | Tesco Mobile          | 3.3200  | 2.1800 | 2.6000  | n.a.         |            | 1%     |
| IS              | Siminn                | 2.4492  | 2.4492 | 2.4492  | 132,458      | 344,520    | 38.45% |
|                 | Vodafone              | 2.4492  | 2.4492 | 2.4492  | 99,202       |            | 28.79% |
|                 | Nova                  | 2.4492  | 2.4492 | 2.4492  | 95,411       |            | 27.69% |
|                 | Tal                   | 2.4492  | 2.4492 | 2.4492  | 16,737       |            | 4.86%  |
| IT              | Telecom Italia S.p.A. | 1.5000  | 1.5000 | 1.5000  | 32,159,435   | 92,724,045 | 34.80% |
|                 | Vodafone Omnitel      | 1.5000  | 1.5000 | 1.5000  | 29,385,630   |            | 31.73% |
|                 | Wind S.p.A.           | 1.5000  | 1.5000 | 1.5000  | 21,649,552   |            | 23.17% |
|                 | H3G S.p.A.            | 1.7000  | 1.7000 | 1.7000  | 9,529,428    |            | 10.29% |
| LT              | Bitė Lietuva          | 2.0244  | 1.0137 | 1.7580  | 1,033,056    | 4,898,291  | 21.09% |
|                 | Tele2                 | 2.0244  | 1.0137 | 1.9665  | 1,948,744    |            | 39.78% |
|                 | Omnitel               | 2.0244  | 1.0137 | 1.7782  | 1,916,491    |            | 39.13% |
| LU              | EPT                   | 8.8000  | 7.6000 | 8.2000  | n.a.         | n.a.       | 52.00% |
|                 | Tango                 | 8.8000  | 7.6000 | 8.2000  | n.a.         |            | 33.00% |
|                 | Orange                | 11.3000 | 9.8000 | 10.5500 | n.a.         |            | 15.00% |
| LV <sup>9</sup> | LMT                   | 3.7340  | 3.7340 | 3.7340  | 1,776,533    | 3,630,150  | 48.94% |
|                 | Tele2                 | 3.7340  | 3.7340 | 3.7340  | 1,094,052    |            | 30.14% |
|                 | Bite Latvija          | 3.7340  | 3.7340 | 3.7340  | 757,014      |            | 20.85% |
|                 | Telecom Baltija       | 8.9042  | 8.9042 | 8.9042  | 2,551        |            | 0.07%  |
| FYROM           | T Mobile Macedonia    | 4.8780  | 4.8780 | 4.8780  | 1,071,864    | 2,235,460  | 47.95% |
|                 | ONE TS                | 6.5041  | 6.5041 | 6.5041  | 532,315      |            | 23.81% |

<sup>6</sup> FR: total number of subscribers include subscribers in mainland France, not including overseas collectivities.

<sup>7</sup> HR: subscribers as of Q3 2012

<sup>8</sup> IE: Irish mobile operators set week-end MTR as follow: Vodafone at 2.600; O2 at 1.300; Meteor at 1.000; Hutchinson 3G at 0.500; Tesco Mobile (MVNO) at 1.810 (€cent per minute).

<sup>9</sup> LV: Figures given as subscribers correspond to granted numbers



|                  |                      |        |        |        |              |              |              |
|------------------|----------------------|--------|--------|--------|--------------|--------------|--------------|
|                  | VIP Macedonia        | 6.5041 | 6.5041 | 6.5041 | 631,281      |              | 28.24%       |
| MT               | Go Mobile            | 2.0700 | 2.0700 | 2.0700 | 194,120      | 551,736      | 35.18%       |
|                  | Vodafone             | 2.0700 | 2.0700 | 2.0700 | 280,561      |              | 50.85%       |
|                  | Melita Mobile        | 2.0700 | 2.0700 | 2.0700 | 65,331       |              | 11.84%       |
|                  | KPN                  | 2.4000 | 2.4000 | 2.4000 | 8,400,000    |              | 40.00%       |
| NL               | Vodafone             | 2.4000 | 2.4000 | 2.4000 | 5,250,000    | 21,000,000   | 25.00%       |
|                  | T-Mobile             | 2.4000 | 2.4000 | 2.4000 | 4,200,000    |              | 20.00%       |
|                  | all MVNO/SP          | 2.4000 | 2.4000 | 2.4000 | 3,150,000    |              | 15.00%       |
|                  |                      |        |        |        |              |              |              |
| NO <sup>10</sup> | Telenor              | 2.0413 | 2.0413 | 2.0413 | 2,881,879    | 5,731,780    | 50.28%       |
|                  | NetCom               | 2.0413 | 2.0413 | 2.0413 | 1,435,903    |              | 25.05%       |
|                  | Network Norway       | 2.0413 | 2.0413 | 2.0413 | 628,792      |              | 10.97%       |
|                  | Tele2                | 2.0413 | 2.0413 | 2.0413 | 462,774      |              | 8.07%        |
| PL               | P4                   | 2.0086 | 2.0086 | 2.0086 | confidential | confidential | 14.25%       |
|                  | PTC                  | 2.0086 | 2.0086 | 2.0086 | confidential |              | 28.23%       |
|                  | Polkomtel            | 2.0086 | 2.0086 | 2.0086 | confidential |              | 27.85%       |
|                  | PTK Centertel        | 2.0086 | 2.0086 | 2.0086 | confidential |              | 29.34%       |
| PT               | TMN                  | 1.2700 | 1.2700 | 1.2700 | 7,485,148    | 16,827,901   | 44.48%       |
|                  | VODAFONE             | 1.2700 | 1.2700 | 1.2700 | 6,551,205    |              | 38.93%       |
|                  | OPTIMUS              | 1.2700 | 1.2700 | 1.2700 | 2,486,854    |              | 14.78%       |
| RO               | Vodafone             | 3.0700 | 3.0700 | 3.0700 | 6,789,037    | 22,843,457   | 29.72%       |
|                  | Orange               | 3.0700 | 3.0700 | 3.0700 | 9,795,796    |              | 42.88%       |
|                  | Cosmote              | 3.0700 | 3.0700 | 3.0700 | 5,024,924    |              | 22.00%       |
|                  | RCS & RDS            | 3.0700 | 3.0700 | 3.0700 | 1,159,854    |              | 5.08%        |
| RS               | MTS (Telekom Srbija) | 4.2298 | 4.2298 | 4.2298 | N/A          | N/A          | N/A          |
|                  | Telenor              | 4.2298 | 4.2298 | 4.2298 | N/A          |              | N/A          |
|                  | Vip mobile           | 4.2298 | 4.2298 | 4.2298 | N/A          |              | N/A          |
| SE               | TeliaSonera          | 1.7395 | 1.7395 | 1.7395 | 4,660,000    | 11,247,000   | 41.43%       |
|                  | Tele2                | 1.7395 | 1.7395 | 1.7395 | 3,723,000    |              | 33.10%       |
|                  | Telenor              | 1.7395 | 1.7395 | 1.7395 | 1,835,000    |              | 16.32%       |
|                  | H3G                  | 1.7395 | 1.7395 | 1.7395 | 1,029,000    |              | 9.15%        |
| SI               | Telekom Slovenije    | 3.2400 | 3.2400 | 3.2400 | confidential | 2,245,666    | 56.79%       |
|                  | Si.mobil             | 3.2400 | 3.2400 | 3.2400 | confidential |              | 29.51%       |
|                  | Tušmobil             | 3.2400 | 3.2400 | 3.2400 | confidential |              | 11.26%       |
|                  | T-2                  | 3.2400 | 3.2400 | 3.2400 | confidential |              | 2.44%        |
| SK               | Orange               | 3.1800 | 3.1800 | 3.1800 | n.a.         | n.a.         | 46.80%       |
|                  | Slovak Telecom       | 3.1800 | 3.1800 | 3.1800 | n.a.         |              | 30.98%       |
|                  | Telefónica           | 3.1800 | 3.1800 | 3.1800 | n.a.         |              | 22.22%       |
| TR <sup>11</sup> | Turkcell             | 1.3450 | 1.3450 | 1.3450 | 35,150,000   | 67,170,000   | 52.33%       |
|                  | Vodafone             | 1.3879 | 1.3879 | 1.3879 | 18,810,000   |              | 28.00%       |
|                  | Avea                 | 1.5899 | 1.5899 | 1.5899 | 13,210,000   |              | 19.67%       |
| UK <sup>12</sup> | Vodafone             | 1.8578 | 1.8578 | 1.8578 | confidential | confidential | confidential |
|                  | O2                   | 1.8578 | 1.8578 | 1.8578 | confidential |              | confidential |
|                  | EE                   | 1.8578 | 1.8578 | 1.8578 | confidential |              | confidential |
|                  | H3G                  | 1.8578 | 1.8578 | 1.8578 | confidential |              | confidential |

<sup>10</sup> NO: subscribers as of 30.06.2012

<sup>11</sup> TR: subscribers as of Q3 2012

<sup>12</sup> UK: MTR figures are the UK average. Individual MTR figure for each MNO is confidential.

## 4. SMS TR

### Assumptions

- Most countries do not differentiate between peak time, off-peak time and weekend hours. According to the responses received, there is no exception in Europe.
- SMS TR are applicable to each domestic *off net* SMS that is well delivered, so there is no assumption regarding set-up charges or average call durations. Slovenia and Latvia are the only countries that apply a "Bill & Keep" system for SMS. The scope of the benchmark is confined to national termination prices.
- International SMS TRs in most European countries are also based on bilateral negotiations among operators which generally result in higher level than the domestic rates that are reflected in this report.
- In some countries, different rates depending on the total number of SMS sent are applied. For those countries, the rates corresponding to the biggest volumes (i.e. lowest rates) are selected to make European comparisons.
- Average SMS TR per country are obtained through pondering the domestic SMS tariff of each operator by its market share, measured in terms of subscribers.
- Two European averages based on the answers received are calculated, as it is also done for voice MTR benchmark: a simple average and a weighted average, pondering each country's average with the share of the country's subscribers (Total subscribers per country / Total European subscribers). In the case of the European weighted average, only the countries that reported the number of subscribers are taken into account.
- In the case of Switzerland, SMS TR are not wholesale interconnection prices but rather the result of an SMS-Interworking agreement among operators. P2P-SMS-Traffic is assumed symmetric. Therefore, there is a kind of 'Bill & Keep' system established between Swiss MNOs.
- Regarding the number of subscribers, it must be taken into account that different methods to evaluate it are used among European countries (especially in the case of pre-paid consumers).





## SMS TR per country as of January 2013 (€)

| Country     | SMS TR per country  |
|-------------|---------------------|
| AT          | 0.0350              |
| BE          | 0.0496              |
| BG          | Confidential        |
| CH          | 0.0570              |
| CY          | 0.0063              |
| CZ          | Confidential        |
| DE          | N/A                 |
| DK          | 0.0107              |
| EE          | 0.0260              |
| EL          | 0.0300              |
| ES          | 0.0366              |
| FI          | Confidential        |
| FR          | 0.0100              |
| HR          | Confidential        |
| HU          | 0.0494              |
| IE          | 0.0317              |
| IS          | 0.0235              |
| IT          | 0.0379              |
| LT          | 0.0145              |
| LU          | N/A                 |
| LV          | 0.0215              |
| FYROM       | 0.0325              |
| MT          | 0.0177              |
| NL          | 0.0560              |
| NO          | 0.0476              |
| PL          | 0.0122              |
| PT          | 0.0178              |
| RO          | 0.0233              |
| SE          | 0.0348              |
| SI          | Bill & Keep for SMS |
| SK          | 0.0304              |
| TR          | 0.0075              |
| UK          | 0.0210              |
| Average (S) | 0.0287              |
| Average (W) | 0.0273              |



### 5. FTR (Incumbent's effective weighted interconnection rate per minute and level) in € cent

| Country          | Operator                            | Layer      | peak   | Off-peak | FTR Average per minute |
|------------------|-------------------------------------|------------|--------|----------|------------------------|
| AT               | A1 Telekom Austria                  | Layer 1    | 0.8200 | 0.4800   | 0.7200                 |
|                  |                                     | Layer 2    | 1.5800 | 0.7300   | 1.3300                 |
|                  |                                     | Layer 3    | 2.1600 | 0.7700   | 1.7400                 |
| BE               | Belgacom                            | Layer 1    | 0.6187 | 0.3247   | 0.4717                 |
|                  |                                     | Layer 2    | 0.8747 | 0.4583   | 0.6665                 |
|                  |                                     | Layer 3    | 1.1213 | 0.5883   | 0.8548                 |
| BG               | Bulgarian Telecommunication Company | Layer 1    | 0.4346 | 0.3579   | 0.4117                 |
|                  |                                     | Layer 2    | 0.4346 | 0.3579   | 0.4117                 |
| CH <sup>13</sup> | Swisscom                            | Layer 2    | 1.0365 | 0.5436   | 0.8045                 |
|                  |                                     | Layer 3    | 0.7996 | 0.4360   | 0.6465                 |
| CY <sup>14</sup> | CYTA                                | Layer 1(l) |        |          | 0.3400                 |
|                  |                                     | Layer 1(r) |        |          | 0.5500                 |
|                  |                                     | Layer 2    |        |          | 0.6300                 |
| CZ               | Telefónica Cz. Republic, a.s.       | Layer 1    | 1.1920 | 0.5960   | 0.8940                 |
|                  |                                     | Layer 2    | 1.3510 | 0.6755   | 1.0132                 |
| DK               | TDC                                 | Layer 1    | 0.0804 | 0.0536   | 0.0761                 |
|                  |                                     | Layer 2    | 0.0804 | 0.0536   | 0.0761                 |
|                  |                                     | Layer 3    | 0.8594 | 0.5430   | 0.8087                 |
| DE               | Telekom Deutschland GmbH            | Layer 1    | 0.3600 | 0.2500   | 0.3000                 |
| EE               | Elion                               | Layer 1    | 0.7333 | 0.4733   | 0.6200                 |
|                  |                                     | Layer 2    | 1.0400 | 0.6600   | 0.8800                 |
| EL <sup>15</sup> | OTE                                 | Layer 1    | 0.2400 | 0.2100   | 0.2190                 |
|                  |                                     | Layer 2    | 0.4500 | 0.4100   | 0.4310                 |
|                  |                                     | Layer 3    | 0.5600 | 0.4800   | 0.5370                 |
| ES <sup>16</sup> | TELEFÓNICA                          | Layer 1    |        |          | 0.3500                 |
|                  |                                     | Layer 2    |        |          | 0.4500                 |
|                  |                                     | Layer 3    |        |          | 0.8400                 |
| FI               | Elisa Oyj                           | N/A        | N/A    | N/A      | 2.4000                 |
| FR <sup>17</sup> | France Télécom                      | Layer 1    | 0.0510 | 0.0317   | 0.0800                 |

<sup>13</sup> It exists a "clause of reciprocity": tariffs of other operators have to be same as the ones of incumbent

<sup>14</sup> CYTA uses layer 1 interconnection for local and regional coverage and layer 2 for national coverage. Alternative operators use layer 2 interconnection.

<sup>15</sup> In Greece there is a third time interval (the respective prices are: for 'Layer 1' 0.1600; for 'Layer 2' 0.3500; for 'Layer 3' 0.4500)"

<sup>16</sup> Time based and Capacity based interconnection have been taken into account for Spain.

<sup>17</sup> The 0.08 €cent/min average FTR is the price cap set by ARCEP; the incumbent is free to define its own tariff structure, providing its overall average revenue does not exceed this cap. In addition to the time-based components, France Telecom's tariff structure includes a capacity based component, which needs to be accounted for in the calculation of the average revenue per minute. This capacity-based component is priced at a unit price of 1000 euros per E1 per year (while the average E1 load is 2.85 million minutes per year).



|                        |                              |         |        |        |               |
|------------------------|------------------------------|---------|--------|--------|---------------|
| <b>HR</b>              | <b>HT</b>                    | Layer 1 | 0.4896 | 0.2448 | <b>0.4028</b> |
|                        |                              | Layer 2 | 0.7278 | 0.3639 | <b>0.5988</b> |
|                        |                              | Layer 3 | 1.4159 | 0.7080 | <b>1.1649</b> |
| <b>HU</b>              | <b>Magyar Telekom</b>        | Layer 1 | 0.3954 | 0.2330 | <b>0.3210</b> |
|                        |                              | Layer 2 | 0.5296 | 0.3107 | <b>0.4290</b> |
|                        |                              | Layer 3 | 0.6743 | 0.3954 | <b>0.5460</b> |
| <b>IE</b>              | <b>Eircom</b>                | Layer 1 | 0.4700 | 0.2600 | <b>0.4000</b> |
|                        |                              | Layer 2 | 0.6057 | 0.1405 | <b>0.5100</b> |
|                        |                              | Layer 3 | 0.7496 | 0.1487 | <b>0.6300</b> |
| <b>IS</b>              | <b>Siminn</b>                | Layer 2 | 0.3857 | 0.3857 | <b>0.3857</b> |
| <b>IT</b>              | <b>Telecom Italia S.p.A</b>  | Layer 1 | 0.2720 | 0.2720 | <b>0.2720</b> |
|                        |                              | Layer 2 | 0.3610 | 0.3610 | <b>0.3610</b> |
| <b>LV</b>              | <b>Lattelecom</b>            | Layer 1 | 0.9700 | 0.9700 | <b>0.9700</b> |
| <b>LT</b>              | <b>TEO LT, AB</b>            | Layer 1 | 0.7269 | 0.2462 | <b>0.5474</b> |
|                        |                              | Layer 2 | 1.3004 | 0.4026 | <b>0.9500</b> |
| <b>LU</b>              | <b>EPT</b>                   | Layer 1 | 0.7333 | 0.3733 | <b>0.5533</b> |
|                        |                              | Layer 2 | 0.9633 | 0.4833 | <b>0.7233</b> |
| <b>FYROM</b>           | <b>Makedonski Telekom AD</b> | Layer 1 | 0.5528 | 0.1951 | <b>0.3740</b> |
|                        |                              | Layer 2 | 0.7317 | 0.3252 | <b>0.5285</b> |
|                        |                              | Layer 3 | 0.8943 | 0.3740 | <b>0.6341</b> |
| <b>MT</b>              | <b>GO plc</b>                | Layer 1 |        |        | <b>0.3803</b> |
| <b>NL</b>              | <b>KPN</b>                   | Layer 2 | 0.3700 | 0.3700 | <b>0.3700</b> |
| <b>NO</b>              | <b>Telenor</b>               | Layer 1 | 0.4355 | 0.4355 | <b>0.4355</b> |
| <b>PL</b>              | <b>TP SA</b>                 | Layer 1 | 0.6639 | 0.4100 | <b>0.4961</b> |
| <b>PT<sup>18</sup></b> | <b>PTC</b>                   | Layer 1 |        |        | <b>0.3921</b> |
|                        |                              | Layer 2 |        |        | <b>0.5081</b> |
|                        |                              | Layer 3 |        |        | <b>0.6321</b> |
| <b>RO</b>              | <b>Romtelecom</b>            | Layer 1 | N/A    | N/A    | <b>0.5800</b> |
|                        |                              | Layer 2 | N/A    | N/A    | <b>0.6700</b> |
|                        |                              | Layer 3 | N/A    | N/A    | <b>0.7300</b> |
| <b>RS</b>              | <b>Telekom Srbija</b>        | Layer 3 | 0.8200 | 0.8200 | <b>0.8200</b> |
| <b>SE</b>              | <b>TeliaSonera</b>           | Layer 1 | 0.2493 | 0.2493 | <b>0.2493</b> |
|                        |                              | Layer 2 | 0.3166 | 0.3166 | <b>0.3166</b> |
| <b>SI</b>              | <b>Telekom Slovenije</b>     | Layer 1 | 0.3900 | 0.3900 | <b>0.3900</b> |
|                        |                              | Layer 2 | 0.6800 | 0.6800 | <b>0.6800</b> |
|                        |                              | Layer 3 | 0.9500 | 0.9500 | <b>0.9500</b> |
| <b>SK<sup>19</sup></b> | <b>Slovak Telekom</b>        | Layer 1 | 0.5000 | 0.1500 | <b>0.3316</b> |
|                        |                              | Layer 2 | 0.7200 | 0.2200 | <b>0.4794</b> |
|                        |                              | Layer 3 | 1.5100 | 0.2900 | <b>0.9229</b> |
| <b>UK<sup>20</sup></b> | <b>BT</b>                    | Layer 1 |        |        | <b>0.2799</b> |
|                        |                              |         | 0.3592 | 0.1610 |               |
| <b>TR</b>              | <b>Türk Telekom</b>          | Layer 1 | 0.5973 | 0.5973 | <b>0.5973</b> |
|                        |                              | Layer 2 | 0.7348 | 0.7348 | <b>0.7348</b> |
|                        |                              | Layer 3 | 0.9625 | 0.9625 | <b>0.9625</b> |

<sup>18</sup> Time and Capacity based interconnection have been taken into account for Portugal.

<sup>19</sup> SK has peak; off-peak and for three operators also an intermediate price.

<sup>20</sup> UK has 3 time periods - Day, evening and weekend. Table above shows day and evening. Weekend tariff is lower than the evening tariff (0.10 pence per minute).

## 6. ANNEXES

### I. COUNTRY ABBREVIATIONS

|       |                                       |
|-------|---------------------------------------|
| AT    | Austria                               |
| BE    | Belgium                               |
| BG    | Bulgaria                              |
| CH    | Switzerland                           |
| CY    | Cyprus                                |
| CZ    | Czech Republic                        |
| DK    | Denmark                               |
| DE    | Germany                               |
| EE    | Estonia                               |
| EL    | Greece                                |
| ES    | Spain                                 |
| FI    | Finland                               |
| FR    | France                                |
| HR    | Croatia                               |
| HU    | Hungary                               |
| IE    | Ireland                               |
| IS    | Iceland                               |
| IT    | Italy                                 |
| LT    | Lithuania                             |
| LV    | Latvia                                |
| LU    | Luxembourg                            |
| FYROM | Former Yugoslav Republic of Macedonia |
| NL    | Netherlands                           |
| NO    | Norway                                |
| PL    | Poland                                |
| PT    | Portugal                              |
| RO    | Romania                               |
| RS    | Serbia                                |
| SE    | Sweden                                |
| SI    | Slovenia                              |
| SK    | Slovakia                              |
| TR    | Turkey                                |
| UK    | United Kingdom                        |

### II. EXCHANGE RATES<sup>21</sup>

| COUNTRY | 1 EURO |
|---------|--------|
| BG      | 1.96   |
| CH      | 1.21   |
| CZ      | 25.17  |
| DK      | 7.46   |
| HR      | 7.56   |
| HU      | 283.25 |
| IS      | 163.32 |
| LT      | 3.45   |
| LV      | 0.70   |
| FYROM   | 61.50  |
| NO      | 7.35   |
| PL      | 4.11   |
| RO      | 4.53   |
| RS      | 113.48 |
| SE      | 8.62   |
| TR      | 2.33   |
| UK      | 0.81   |

<sup>21</sup> European Central Bank website:

<http://sdw.ecb.europa.eu/browseSelection.do?DATASET=0&FREQ=Q&CURRENCY=&node=2018794>

THE UNITED REPUBLIC OF TANZANIA  
TANZANIA COMMUNICATIONS REGULATORY AUTHORITY



## **PRESS RELEASE**

**DECISION ON INTERCONNECTION RATES IN THE UNITED REPUBLIC OF TANZANIA,  
INTERCONNECTION DETERMINATION NO.3 ISSUED IN 2013**

### **1.0 INTRODUCTION**

This Determination is made under the Tanzania Communications Regulatory Authority Act, Chapter 172 of the laws of Tanzania (TCRA Act). In compliance with the requirements of the TCRA Act, an inquiry was conducted by a Panel of Inquiry from 17<sup>th</sup> December 2012 to 28<sup>th</sup> January, 2013. The Panel of Inquiry considered among others the report of PricewaterhouseCoopers (UK) LLP; the Consultant who carried out the cost study to establish cost based interconnection rates among the telecommunications network operators in the United Republic of Tanzania. The study used the Forward Looking Long Run Incremental Cost (FL-LRIC) Methodology. The Panel of Inquiry submitted its report on 28<sup>th</sup> January 2013.

This Determination shall be known as Determination No.3 issued in 2013 on cost based Interconnection Rates for voice call termination in the United Republic of Tanzania (hereinafter referred to as the "Determination"). This Determination shall be effective on the 1st day of March 2013 and is binding to all Telecommunications Network Operators operating in the United Republic of Tanzania following the expiring on 28<sup>th</sup> February 2013 of Determination No. 2 of 2007 as extended vide Government Notice No.425 published on 28<sup>th</sup> December 2012.

### **2.0 CONSIDERATION OF THE FINDINGS OF THE PANEL OF INQUIRY**

After thorough scrutiny of the Report of Inquiry on appropriate cost based interconnection rates, the Authority concurs with the findings of the Panel of Inquiry that:

#### **2.1 CONFORMITY WITH THE LAW**

##### **2.1.1 Panel of Inquiry**

The Panel of Inquiry was appointed by the Authority in accordance with rule 6(1) of the Tanzania Communications Regulatory Authority (Procedure for Rules of

Inquiry) Rules, 2004. The notice of inquiry was published in the Gazette on 28<sup>th</sup> December, 2012.

### 2.1.2 Procedure of Inquiry

The procedure laid down in Section 18 of the Tanzania Communications Regulatory Authority Act, 2003, and the Tanzania Communications Regulatory Authority (Procedure for Rules of Inquiry) Rules, 2004 was complied with. The inquiry was conducted at the instance of the Authority pursuant to Section 18(3) of the TCRA Act. The inquiry was conducted as a condition precedent to the issuance of interconnection rates determination as required by Section 18(2) of the TCRA Act.

The inquiry was conducted in a transparent manner involving all the Telecommunications network operators and other stakeholders including the general public in accordance with the Tanzania Communications Regulatory Authority (Procedure for Rules of Inquiry) Rules of 2004.

The inquiry process involved literature review, stakeholders consultations, written submissions and public hearing to get views from operators, consumers, Government officials and other stakeholders including the general public. Finally, the Panel of Inquiry produced the Report that was submitted to the Authority on 28<sup>th</sup> January 2013.

The Panel of Inquiry established that all operators are in agreement that the current interconnection rates are high and should be reduced; however, they differ on the rate and percentage of reduction. Five operators, namely; Benson Informatics Limited, Dovetel Tanzania Limited, Six Telecoms Company Limited, Tanzania Telecommunications Company Limited (TTCL) and Zanzibar Telecommunication Company Limited (ZANTEL) accepted the results and proposed even further reduction of the interconnection rates. TTCL went further suggesting that the proposed interconnection rates should be applied retrospectively (i.e. from 1<sup>st</sup> January 2013).

Airtel Tanzania Limited, MIC Tanzania Limited and Vodacom Tanzania Limited, rejected the results and each proposed different interconnection rates arguing that drastic decrease will affect their capacity to invest in the rural areas.

## 2.2 NATURAL JUSTICE

The Authority has noted that the Panel of Inquiry has been satisfied that no principle of natural justice was breached in view of the fact that all procedural requirements were complied with and every interested party was afforded an opportunity to be heard during the Public Hearing.

## 2.3 INVOLVEMENT OF STAKEHOLDERS

In compliance with the Terms of Reference, the Authority is satisfied with the finding of Panel of Inquiry that all stakeholders were involved in a transparent



manner. There was a stakeholders' workshop with the Consultant on 18<sup>th</sup> December 2012. The Authority notes that the Panel of Inquiry visited all Telecommunications operators, namely Tanzania Telecommunications Company Limited, Benson informatics Ltd, Six Telecoms Company Limited, Airtel Tanzania Limited, Vodacom Tanzania Limited, MIC (Tanzania) Limited and Zanzibar Telecommunications Company Limited and; other stakeholders, namely; Ministry of Communication, Science and Technology of the United Republic of Tanzania and Ministry of Communications and Infrastructural Development of Tanzania Zanzibar from 7 to 15 January, 2013. The Panel received written submissions, and all stakeholders made oral submissions during the Public Hearing on 17<sup>th</sup> January 2013. The Authority concurs with the Panel of Inquiry's major finding at the Public Hearing that the current interconnection rates are still high and they need to be reduced to reflect actual costs involved.

#### **2.4 THE COST STUDY ON INTERCONNECTION**

The Authority has satisfied itself that the M/S PriceWaterHouseCoopers' cost study on interconnection of 2012 is relevant to the current market environment of the Telecommunications industry in Tanzania. The Authority found that the cost study and the Forward Looking – Long Run Incremental Cost (FL-LRIC) model are in line with international best practices and are in accordance with the laws and regulations governing the ICT sector in Tanzania.

#### **2.5 WEIGHTED AVERAGE COST OF CAPITAL**

The Authority agrees with the value of Weighted Average Cost of Capital (WACC) of 22.88 % as used by the Consultant in the final model. The Consultant's WACC figure was estimated mainly by using the Tanzanian local parameters amongst others the Tanzanian long term inflation rates provided by the Bank of Tanzania (BOT), country risks, risk free rates and corporate tax, which the Panel considers to be more relevant to the issues under discussion.

#### **2.6 OTHER METHODOLOGIES FOR INTERCONNECTION RATE DETERMINATION**

The Authority has noted that the Panel of Inquiry has considered other methodologies particularly benchmarking. The Panel of Inquiry has looked at benchmarks of selected African countries which have undertaken some form of cost studies. The Authority finds that the interconnection rates have decreased across countries during the past five years. The current interconnection rates in Tanzania are higher than in some considered African countries.

#### **2.7 DESIRE TO PROMOTE COMPETITIVE RATES AND ATTRACT MARKET**

The Authority concurs with the Panel of Inquiry's observation that all operators have monopoly on terminating calls on their networks. In order to promote fair competition, there is indeed a need for regulating interconnection rates.

## **2.8 FINANCIAL IMPLICATIONS**

The Authority accepts the view that in the short run there will be less revenue to be realized from interconnection by operators who are currently net receivers. However, net payers will experience a reduction in costs by paying less interconnection charges to other operators. It is the considered view of the Authority that traffic patterns will change through increase of subscribers and air time.

## **2.9 CONSUMERS INTEREST**

The Authority concurs with the Panel of Inquiry's support of majority of operators and other stakeholders that reduction of interconnections rates should translate into a reduction of retail tariffs.

## **2.10 INVESTORS INTEREST**

The Authority dismisses arguments by some operators that reduction of interconnection rates will hinder the roll-out and expansion of networks in the rural areas because there is no direct relationship between interconnection rates and investment & rollout in rural areas. The Interconnection Rates ought to reimburse efficient cost incurred in terminating the traffic to from another network. The Authority is of considered view that the Infrastructure sharing, Universal Communications Services Access Fund (UCAF) and the National ICT Broadband Backbone (NICTBB), if utilised properly, will augment efforts to cut cost and facilitate rollout especially in rural and urban underserved areas.

## **2.11 MARKET TREND**

The Authority notes the observation of the Panel of Inquiry that the market is very dynamic and there is increasing competition evidenced by new products and services.

## **2.12 TREATMENT OF OUTGOING INTERNATIONAL CALLS**

The Authority is in agreement with the Panel of Inquiry's observation that outgoing international calls are not subject to regulation because an international gateway operator must pay to an international carrier to terminate a call in a foreign country and the charges should continue to be determined through commercial negotiations.

## **2.13 TREATMENT OF INCOMING INTERNATIONAL CALLS**

The Authority notes that an incoming international call from outside Tanzania transits through an international gateway within Tanzania and terminates on a national network. The Authority reaffirms that calls transited through a gateway in Tanzania, irrespective of their origin, fall within the scope of the Determination.



The incoming international traffic calls transiting through the international gateways within Tanzania irrespective of their origin pay cost for terminating calls on the national network, and hence is subject to the Electronic and Postal Communications (Interconnection) Regulations, 2011 and this Determination.

### 3.0 THE DETERMINATION

The Authority hereby determines Interconnection rates to be applied among the Telecommunication network operators in the United Republic of Tanzania as follows:

- 3.1** The appropriate cost-based interconnection rates and the glide path shown in the Table below.

Table on Glide path for cost-based Interconnection rates (TZS) with effect from 1<sup>st</sup> March 2013 to 31<sup>st</sup> December 2017:

| Year  | 1 <sup>st</sup> March<br>2013 | 1 <sup>st</sup> January<br>2014 | 1 <sup>st</sup> January<br>2015 | 1 <sup>st</sup> January<br>2016 | 1 <sup>st</sup> January<br>2017 |
|---|-------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|
| Voice call<br>termination<br>rates in TZS<br>per minute | 34.92                         | 32.40                           | 30.58                           | 28.57                           | 26.96                           |

- 3.2** The determined Interconnect Rates are upper ceilings, but the Interconnecting Operators are free, within the law, to commercially negotiate and agree on lower rates.
- 3.3** The interconnection rates shall be used for termination of traffic in network services operators in Tanzania; this includes traffic coming from International network services operators licensed in Tanzania.
- 3.4** All operators are required to enter into new Interconnection Agreements and submit the same to the Authority by 31<sup>st</sup> March, 2013.

**Prof. John S. Nkoma**  
**DIRECTOR GENERAL**  
**TANZANIA COMMUNICATIONS REGULATORY AUTHORITY**

**29<sup>TH</sup> JANUARY, 2013**





**DETERMINATION OF VOICE INTERCONNECTION  
RATES**

**ISSUED BY**

**NIGERIAN COMMUNICATIONS COMMISSION**

**20<sup>th</sup> March 2013**

A handwritten signature in black ink, appearing to be 'ZB', is located in the bottom right corner of the page.

## **VOICE INTERCONNECTION RATE DETERMINATION BY THE NIGERIAN COMMUNICATIONS COMMISSION**

### **INTRODUCTION**

1. Interconnection is critical to the proper functioning of a competitive communications market. This is recognised in the Nigerian Communications Act 2003 (The Act), which requires network facilities providers and network service providers to provide other licensees with interconnection on request at any technically feasible location.
2. The current regime of interconnection rate regulation was implemented through the Commission's Interconnection Rate Determination issued on 21 December 2009. Since then, the Nigerian Communications Market has seen tremendous growth in both, subscriber numbers as well as traffic volumes and available technologies (e.g. 3G).
3. Due to these developments the Commission decided to review the rates set in its 2009 Determination in the light of current information including technological changes as well as market evolution.
4. The scale of changes noted above inevitably lead to changes in the unit cost of providing services including interconnection and may give rise to differences between regulated interconnection rates and underlying costs which in turn may result in differences between on-net and off-net retail tariffs which are not cost reflective. Such differences may be used by larger operators strategically to limit switching to smaller networks.
5. The Commission has retained PricewaterhouseCoopers (PwC) to undertake in-depth cost studies of the voice interconnection rates.

### **LEGAL BASIS FOR THIS DETERMINATION**

#### **BACKGROUND**

6. The Commission's functions and duties are set out in the Nigerian Communications Act 2003 (the "Act"). Section 4 of the Act lists the Commission's functions, which include the facilitation of investments in and entry into the Nigerian market for the provision and supply of communications services, equipment and facilities (section 4(a)), the protection and promotion of the interests of consumers against unfair practices including but not limited to matters relating to tariffs and charges and the availability and quality of communications services, equipment and facilities (section 4(b)), and the promotion of fair competition in the communications industry and protection of communications services and facilities providers from the misuse of market power or anti-competitive and unfair practices by other service or facilities providers (section 4(d)).



7. The Commission also has general responsibility for the economic and technical regulation of the communications industry (section 4(w)).
8. Section 4(2) of the Act requires the Commission to carry out its functions, meet its duties, and exercise its powers efficiently, effectively and in a non-discriminatory and transparent manner and in a way that is best calculated to ensure that throughout Nigeria, subject to the regulatory controls set out in the Act, all forms of communications services, facilities and equipment are provided on such terms and subject to such conditions specified by the Commission from time to time.
9. Network services providers and network facilities providers are required by section 96 of the Act to provide other licensed operators with interconnection to their communications systems on request at any technically feasible location. Agreements for interconnection must according to section 97(1)(a) comply with the Act, the regulations and any guidelines published intermittently. Although the terms and conditions of interconnection agreements are primarily to be those agreed on by the parties, section 97(2) of the Act empowers the Commission to intervene on its own initiative or at the request of one or both negotiating parties where the Commission considers that an agreement or individual provisions of the agreement are inconsistent with the provisions of the Act or subsidiary legislation, where agreement cannot be reached, where there is a delay in reaching agreement, or if the Commission considers that it is in the public interest to do so.
10. Section 97(2) of the Act therefore provides significant discretion for the Commission to intervene in interconnection negotiations and in concluded agreements. Further, section 98(3) of the Act provides that the Commission can, following consideration of the terms and conditions and charges set out in an agreement; require that the parties revise the agreement if it is not consistent with the Act, the regulations, or interconnection guidelines.
11. The National Telecommunications Policy also empowers the Commission to publish clear and appropriate studies and standards for any cost analysis required to support the development of equitable interconnection charges. Rate setting methodologies can also be included in any regulations made by the Commission under section 99 of the Act.
12. The Interconnection Regulations 2006 oblige the Commission to encourage and secure adequate interconnection and interoperability of services and to carry out its functions in a way that promotes efficiency, sustainable competition and gives the maximum benefit to users (para 2). The Interconnection Regulations 2006 further envisage interconnection charges determined by the Commission (para 6).

#### **BASIS FOR SETTING BINDING RULES**

13. Voice and data interconnection underpins the provision of a wide range of services to consumers and is essential in order to ensure the development of "modern, universal, efficient, reliable, affordable and easily accessible communications services" in Nigeria. This is one of the objectives of the Act itself and is reflected in the Commission's functions, which are described in paragraph 2 of this section of the determination.



14. In line with economic efficiency principles and international best practice interconnection rates should be based on the economic costs of providing the services in question. Cost based interconnection rates were determined in Nigeria in 2006 and 2009 and have now been updated in the light of technological and market developments.
15. For the reasons summarised above, the Commission believes that it is in the public interest to intervene at its own instance to determine voice interconnection rates to be applied by all fixed and mobile operators, both in concluded agreements and when negotiating interconnection. In reliance on section 97(2)(c) of the Act, the Commission makes this Determination.

### PROCESS ADOPTED

16. In June 2012, the Commission appointed PricewaterhouseCoopers LLP ([www.pwc.co.uk](http://www.pwc.co.uk)) to undertake a cost study for voice interconnection.
17. In line with its commitment to a policy of openness, transparency, fairness, and participatory regulation, the Commission informed stakeholders in July 2012 of its engagement of PwC to advise on the review of interconnection rates for mobile and fixed telephony services.
18. Furthermore, a general stakeholder meeting took place on the 18th July, 2012. At this meeting with the operators the Commission explained the rationale for the appointment of PwC, the work that would be undertaken by PwC, and the level of cooperation required from operators. Additional meetings were held during the course of the week with some of the operators. In the course of these meetings, PwC met with operators representing different license groups to explain the consultancy, discuss issues of voice and data interconnection, and to obtain the required information and documentation. Appendix A provides an overview of a range of issues related to the interconnection framework which were discussed between the Commission, PwC, and industry stakeholders in a workshop on 18 July 2012.
19. Following these meetings, PwC provided the Commission with recommendations related to the regulation of voice interconnection.
20. For the voice interconnection cost modelling the recommendations can be summarised as follows:



| Topic                   | Recommendation   |
|-------------------------|--|
| Cost modelling approach | Hybrid costing model; Modelled network is based on a scorched node approach; Modelled network takes the actual and planned coverage of a typical operator and the specific factors of Nigeria into account; Calculation of cost of efficient service provision |
| Cost modelling concept  | LRIC plus mark-up for joint and common costs; Allocation of common costs by using an equi-proportionate mark-up; Retail costs are excluded from interconnection rates  |
| Cost basis              | Forward-looking costs; The model reflects the year 2011 and three future years.  |
| Depreciation            | Tilted annuity is used as depreciation methodology   |
| Cost of capital         | Estimation of the current Cost of Capital based on CAPM model and current market information.  |
| Quality of Service      | Model reflects the targeted quality of service   |

21. Applying these principles, PwC then built a model for GSM/3G network for a representative operator in the Nigerian market. The underlying methodology of the model is based on the dimensioning of the network based on traffic demand and network design parameters having regard to the Nigerian operating environment.

22. After the stakeholder meeting, where the consultant briefed the operators on the scope of the assignment, a harmonised questionnaire to gather information and views of operators was sent:

- MTN Nigeria Communications Limited (MTN)
- Glo Mobile Limited (Glo)
- Airtel Networks Limited (Airtel)
- Emerging Market Telecommunication Service Limited (Etisalat Nigeria)
- Multilinks Telecommunications Limited (Multilinks)
- Starcomms Nigeria limited (Starcomms)
- Visafone Communications Limited (Visafone)

23. These written requests were followed up with telephone and email discussions to elaborate and explain the nature of the data.

24. In response to the Commission's requests, Data was received from the following operators: MTN, Glo, Airtel, Etisalat, and Visafone.



25. In September and October 2012, the consultants reviewed and analysed the data received from the operators. These reviews revealed certain gaps and other issues with some of the data that was submitted by the operators.
26. Between the 30<sup>th</sup> of October and the 1<sup>st</sup> of November 2012 PwC met with Etisalat Nigeria, Airtel, Visafone, MTN Nigeria and Glo in order to reconcile identified inconsistencies in data provided and to obtain additional information to address gaps in data provided. Based on this updated information, additional benchmark values for equipment prices and external analyst forecasts the set of input variables for the model (GSM/3G) was defined and the cost model was populated.
27. On February 1st, 2013, the Commission held a consultative meeting with operators and other stakeholders. The consultants' recommendations were discussed and the majority of the operators found these recommendations acceptable. In addition operators were provided with the electronic version of the voice interconnection model. This model version only contained the input data that was used to model the generic operator and all operator specific and confidential data was withheld.
28. Operators were invited to study the model and provide comments to the Commission by 15 February, 2013.

#### **CONSIDERATION OF SUBMISSIONS MADE BY OPERATORS**

29. The purpose of this section is to provide an overview of the comments received as well as the responses of the Commission to these comments. Comments not directly relevant to voice interconnection have not been included in this determination.
30. The comments received have been summarised and grouped by subject area. The names of the operators making the individual comments have not been included.

#### ***Comments on the Regulation of Voice Termination***

##### **Comments on Asymmetry**

31. Asymmetry of interconnection rates (whereby different operators are entitled to charge different interconnection rates) was a recurring theme in the comments from many operators who submitted responses during the consultation process. However, their views on asymmetry were different.
32. Some operators argued that smaller operators have a significantly different and higher unit cost structure as a result of their size when compared to larger established operators and that the asymmetric regime should therefore be re-established.





33. One operator stated that there should be an asymmetric regime to be applied to dominant operators as their size should translate into differences in interconnection costs compared to other operators.
34. One operator argued that interconnection regulation should be implemented only in response to a specific market failure.
35. Other operators argued that asymmetry was meant to be a temporary measure and that the 2009 determination established all asymmetries were to expire by the 31<sup>st</sup> of December 2012.

**Response:**

36. While it is true that there are significant differences in the sizes and traffic volumes between different operators in Nigeria, it is the case that there are also significant differences in the areas that operators cover. The principle driver of the unit cost of traffic services is traffic density rather than total traffic. For example it is probable that a smaller operator which carries more traffic per square km than a larger operator will enjoy a lower unit costs.
37. Furthermore, some operators have the same amounts of spectrum allocated in the same bands, using the same technologies and have the same rollout obligations. Therefore, even though they might not all have similar sizes, there are no differences in their conditions which would translate into systematically higher cost.
38. When a single interconnection rate is set, the information from a heterogeneous group of operators is taken in order to derive the interconnection cost of the representative operator. By definition the resulting network does not perfectly resemble any of the existing operators in the country.
39. With regards to the issue of dominance, Mobile Termination has generally been determined to be a relevant market in telecommunications and one in which each operator has a monopoly. Therefore, other things being equal, all operators have an incentive to set termination rates at monopoly levels regardless of their size. The way in which this issue has been traditionally addressed has been through cost-based regulated interconnection rates as is the case in Nigeria. Whether there is dominance in other relevant markets and the remedies that are to be implemented is not part of this study and determination.
40. In its 2009 determination the NCC stated that "The Commission further determines that after 31st December 2012, all termination rates shall henceforth be symmetric". Nonetheless, the 2009 determination also stated that "This Determination shall take effect from 31st December, 2009 and remain valid and binding on Licensees for the services specified in paragraphs 1(a) to (e) of this Section, until further reviewed by the Commission." Thus, the Commission recognised that a further review would be performed and subject to the findings of such a review retains the rights to issue a new Interconnection Determination, setting out new rules and determinations related to interconnection including rates, including the option of extending the application of asymmetry and the specification of which operators should be eligible for asymmetric rates.





### Comments regarding the calculation of the WACC

41. Some operators argued that the effect of the weakening currency had not been taken into account in the calculation of the WACC and that this was bound to have a significant effect on the costs of the operators.
42. Another operator argued that there were significant differences in the inflation rates that were used for the calculation of the WACC and that these could have a significant effect on interconnection rates going forward.

Additional comments were made in relation to some of the parameters that were used in the calculation of the WACC. These included the use of information from other jurisdictions to estimate the value of the parameters when Nigeria-based information was available and the capital mix ratios used and their impact on other parameters.

### Response

43. The statement that the effect of devaluation has not been taken into account is incorrect. The calculation of the Cost of Capital (WACC) was based on several foreign currency rates such as the yield of the US treasury bonds. In order to arrive at a rate in nominal Nigerian Naira an adjustment has to be made to account for long term devaluation. This is given by the difference between the long term Nigerian inflation and the long term US inflation. Therefore, the effect of devaluation is indeed taken into account in the calculation of the Cost of Capital.
44. In addition to this, inflation has been applied in the calculation of the WACC in order to have an estimation of forecast devaluation, which is required to convert rates in USD to rates in Naira. This however does not preclude adjustments in the actual interconnection rates being made using actual inflation in the future.
45. It is also incorrect to assume that preference should be given to local data when available over internationally observable data. For instance, one of the assumptions of the CAPM model is that assets are traded in an efficient market where non-systematic risk can be fully diversified. This is rarely the case in capital markets in developing markets. For this reason, even though local data might be available, information from foreign markets is used and adjusted to bring it into the Nigerian context. There are also issues of liquidity and duration of the assets being used to estimate the parameters which mean that local information might not be usable. For this reason, even though local data might be available, information from foreign markets is used and adjusted to bring it into the Nigerian context.
46. The information collected to estimate the D/E ratio and beta is that of companies that operate in developing countries where infrastructure is being rolled out. For instance, the sample includes companies such as Millicom International (Tigo), MTN and Bharti Airtel, all of which have focused their operations in developing countries.

### **Comments on the assumptions of the operating conditions and required investments**

47. One operator commented that the model did not take into account the investments that are required in order to provide the required quality of service including investments in future capacity reflecting the operating conditions in the Nigeria, for example, the requirements for independent power sources at the sites.

### **Response**

48. The network that was dimensioned not only takes into account demand parameters but also target Quality of Service (QoS) indicators. The model that was provided to operators includes the QoS parameters including a Grade of Service (Blocking probability) of 2%. Therefore, the dimensioned network can convey the dimensioned demand at the specified level of QoS. It is worth mentioning that the information that has been gathered would seem to indicate that few, if any, operators currently meet this grade of service.
49. Furthermore, the network is dimensioned in such a way that this quality of service can be achieved while new capacity is being built to cope with the increased demand. It is therefore not correct to conclude that there was no consideration to the need for future investments in future capacity.
50. The assertion that the model does not take into account the investments required to cope with the forecast demand for 2013 and beyond is also inaccurate. The model is specifically specified to identify the investment and operating cost requirements for a network conveying forecast traffic loads at a specified QoS standard. Therefore, even for the last year of the forecast, the resulting network that gives the interconnection cost for this year is capable of conveying the dimensioned demand at the established level of Quality of Service.
51. Finally, the assumptions that were used in the model were based on the information that was collected from the Nigerian operators and this includes network layout including power sources at sites. Even though the model assumptions may not precisely coincide to those of a specific operator it is representative of the data obtained from operators as a whole.

### **Comments on the effects of bad interconnection debt on the cost estimation**

52. Some operators raised the issue of the existing bad interconnection debt and the possible effects that this should have on the calculation of the interconnection rate. It is argued that bad interconnection debt has a capital cost and should therefore be included.

### **Response**

53. The issues relating to bad interconnection debt, should be resolved through enforcement of existing regulations and facilitation of dispute resolution by the NCC, not by making adjustments to the interconnection rates.



#### **Comments on data assumptions**

54. One operator requested to know where assumptions were used when there was insufficient data in order to assess the possible impact of these assumptions on the overall results.

#### **Response**

55. Although there were some gaps in the data collected from operators, in most cases the information that was collected from other operators was sufficient to cover these gaps. In the very few instances where this was not possible, the assumptions that were used were based on PwC's experience in building these models across the world, including in sub-Saharan Africa.

56. All assumptions are included in the model which was provided to operators. The model provided is fully operational and operators are free to change any input or assumption data to observe the impact on modelled interconnection costs.

#### **Comment on Impact assessment of the 2009 Interconnection determination**

57. One of the operators argued that there has not been a complete assessment of the effects of the 2009 interconnection determination and that one should be carried out before issuing a new interconnection determination.

#### **Response**

58. The main purpose of carrying out an update of the interconnection rates is to reflect the changes that have taken place in the telecommunications sector in the country and their effect on the cost of interconnection. As such, the need to update the interconnection rates is not based on the impact or lack thereof of the previous interconnection rates but rather the need to ensure that rates remain cost based and reflect the conditions of interconnection in the country.

#### **Comments regarding economies of scale of large International brands**

59. One operator argued that it does not enjoy the same purchasing economies of scale of other international operators present in Nigeria when it comes to buying equipment from vendors.

#### **Response**

60. The cost base that has been used for the determination of the interconnection rate has been based on information provided by all operators. Furthermore, all operators received a fully functioning copy of the model, including the cost information that was used and could therefore compare the costs that were used to its own and highlight the ones where these differ significantly and provide the necessary evidence.

**Conclusions**

61. The Commission would like to thank all operators who have submitted information relating to the regulation of interconnection rates and the costing models.
62. The Commission has carefully considered the information provided by stakeholders and has taken a view on parameters and regulatory measures in the light of this and other information – such as international experience and publicly available information. The process of arriving at a new regulatory regime for the interconnection of operators and for retail pricing in Nigeria has been conducted in a climate of openness and with a view to providing maximum transparency to all parties without compromising the confidentiality of commercially sensitive information.
63. The Commission is confident that the results will make a significant contribution to the development of a thriving telecoms sector in Nigeria and hence benefit both consumers and the industry.



## DETERMINATION

1. The Commission hereby determines that:

a) The Termination Rates for voice services provided by New Entrants and Small Operators in Nigeria irrespective of the originating network shall be:

- I. **N6.40 (Six Naira Forty Kobo) from 1<sup>st</sup> April, 2013;**
- II. **N5.20 (Five Naira Twenty Kobo) from 1<sup>st</sup> April, 2014; and**
- III. **N3.90 (Three Naira Ninety Kobo) from 1<sup>st</sup> April, 2015.**

**Note:**

- i) New Entrant is defined as newly licensed Operator entering an existing or new market within 0 to 3 years.
- ii) Small Operator is defined, for the purpose of this Determination, as an existing Operator with a market share of 0 – 7.5% in terms of subscriber base.
- iii) Asymmetry shall cease as soon as it is evident that any Small Operator has exceeded the 7.5% market share threshold before the end of this determination period.
- iv) Any Small Operator that has benefited from Asymmetric Rates before exceeding the threshold of 7.5% market share shall cease to qualify for Asymmetry in the future should the referenced market share decline.

b) The Termination Rates for voice services provided by Other Operators in Nigeria irrespective of the originating network shall be:

- I. **N4.90 (Four Naira Ninety Kobo) from 1<sup>st</sup> April, 2013;**
- II. **N4.40 (Four Naira Forty Kobo) from 1<sup>st</sup> April, 2014; and**
- III. **N3.90 (Three Naira Ninety Kobo) from 1<sup>st</sup> April, 2015.**

2. The operators satisfying the asymmetry test will be defined by the Commission and currently comprise:

- o Visafone Communications Limited
- o Starcomms Nigeria Plc
- o Multi-Links Nigeria Limited
- o Reliance Telecommunications
- o InterCellular Nigeria Limited
- o VGC Nigeria Limited
- o 21<sup>st</sup> Century Nigeria Limited
- o Monarch Communications Limited
- o Intra Networks Limited

3. This Determination shall take effect from 1<sup>st</sup> April 2013 and remain valid and binding on Licensees for the next three years until further reviewed by the Commission.
4. The interconnection rates determined in paragraph 1 above shall be applied by and payable (including by way of internal transfer pricing) to all licensees who have been allocated numbers by the Commission.
5. In this Determination, unless the context requires otherwise, the following expressions shall have the meanings set out below.

|                                 |   |
|---------------------------------|---|
| "Mobile voice call termination" | Termination by the receiving operator of a voice call intended for a number within a range ascribed to mobile services in the national numbering plan and allocated to the receiving operator which call has been delivered to that operator by an interconnected operator (which may be the originating operator or another operator, including an operator providing transit of the call through its telecommunications network) at a point of interconnection and routed by the terminating operator through its telecommunications network.   |
| "Fixed voice call termination"  | Termination by the receiving operator of a call intended for a number within a range ascribed to fixed services in the national numbering plan and allocated to the receiving operator which call has been delivered to that operator by an interconnected operator (which operator may be the originating operator or another operator, including an operator providing transit of the call through its telecommunications network) at a point of interconnection and routed by the terminating operator through its telecommunications network. |

This Determination shall take effect from 1<sup>st</sup> April 2013 and remain valid and binding on Licensees for the next three years, for the services specified in paragraphs 1(a) and (b) of this Section, until further reviewed by the Commission.

**Dated this 20<sup>th</sup> day of March, 2013.**

**Dr. Eugene Juwah**  
**Executive Vice-Chairman**  
**Nigerian Communications Commission**  
**Abuja – Nigeria.**



## APPENDIX A

During an initial stakeholder workshop held in Lagos on 18 July 2012 PwC presented an overview of their work programme which included an analysis of a range of wider policy issues related to the matter of interconnection. The discussions included the following issues:

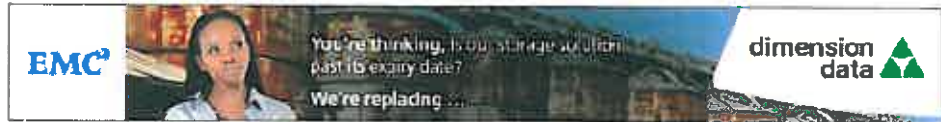
- Methodology being used compared to the previous study and which assumptions from the previous model were to be carried over
- Services to be modelled
- Operator to be modelled and how smaller operators were to be accommodated
- Whether the model was to include both 2G and 3G technologies
- Frequency of the reviews of the interconnection rates
- The effect of interconnection regulation in a market with a dominant operator
- Interconnection models used in other jurisdictions
- Steps to be taken to avoid small operators continuing to be net payers of interconnection
- Whether the study was to consider the rollout conditions of smaller operators
- What is being done to address the effect of bad debt
- The need for a study to ascertain the level of competition in the market
- Depreciation method to be used and asset categorisation
- Practicality of implementing a bill and keep mechanism





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## Cell C subscriber growth soars

Cell C says it has signed up one million gross customers in September, having achieved that milestone for the first time in July.

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October 10, 2013

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Cell C says it has signed up one million gross customers in September, having achieved that milestone for the first time in July.

Speaking at the MyBroadband 2013 conference in Midrand, Cell C CEO, Alan Knott-Craig said that South Africa's third operator had again signed up in excess of one million customers in September, for the second time ever.

The company told BusinessTech that it fell marginally short of reaching that target in August, meaning that its gross sign-ups is close to three million over the past three months.

"We have grown our base by 33% to 12.3 million customers in just 18 months," Knott-Craig told delegates at the conference.

In July 2013, Cell C revealed that it had 11.7 million subscribers on its network – a steady climb from 8.2 million users in 2011 and 9.4 million in 2012 – boosting its relative market share to over 17%.

Knott-Craig has said that the company is targeting 25% market share in order to be profitable.



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He added that the company has doubled the traffic on its network over the last 12 months. "When you come to the data traffic, I think its quadrupled," the CEO has said previously.

This has put a strain on infrastructure, with Cell C subscribers voicing their displeasure over the quality of the operator's network in recent months.

In an effort to address this issue, Cell C kicked off its network improvement project for the Gauteng region in August.

Knott-Craig said that 134 additional sites are being rolled out in order to tackle congestion and improve overall network performance, with 48 sites already completed.

Cell C plans to have 4,210 sites in South Africa by the end of November 2013, with 1,260 sites serving Gauteng alone.

The CEO said that capacity on the 3G network has been increased by 30% since January, with capacity to be further increased (target 47% increase during 2013).

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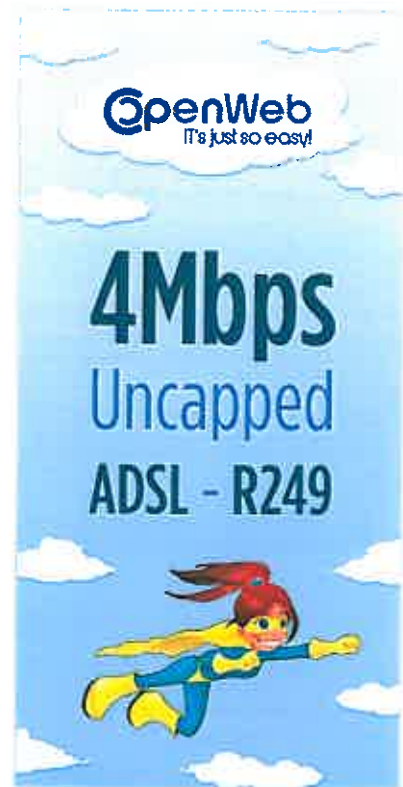
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Tuesday, February 11, 2014

## Cell C lauds Icasa rates decision

*The operator's chief financial officer, Robert Pasley, says Vodacom and MTN are unlikely to be successful if they challenge the telecommunications regulator's final regulations on wholesale inter-network call rates in court.*  
By Duncan McLeod.

Article by Duncan McLeod on 11 February 2014

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Robert Pasley

Cell C, the big winner in Tuesday's publication by telecommunications regulator Icasa of wholesale inter-network call rates for the coming four years, has lauded the authority's decision to introduce aggressive "asymmetry" that favours it and other smaller network operators.

Cell C chief financial officer Robert Pasley says the level of asymmetry — which disfavours network operators with more than 20% retail market share — is even stronger than what Icasa had proposed in draft regulations published in 2013.

The move is likely to provoke a backlash from Vodacom and MTN, though neither company was in a position to provide comment immediately.

"The asymmetry is better [than in the draft regulations]," says Pasley. "It's higher in the first year, and then it climbs. As far as I am concerned, the draft regulations gave us a reasonable shot at becoming a sustainable competitor. This only increases our chances of being successful."

He describes Icasa's move as "really good for the whole economy" as retail prices are "still too high". He says Cell C will adjust its retail tariffs as a result of the final regulations, but warns that Cell C's rates are already very competitive so consumers shouldn't expect dramatic price reductions.

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It is "quite possible" that Vodacom and MTN will challenge the final regulations in court, though Pasley says it is "unlikely" that they will be successful in any application "because the underlying costs of termination are broadly in line with where Icasa is going. There are many pro-competitive and pro-public interest reasons that Icasa has come out with this regulation."

Reunert subsidiary Nashua Communications has also welcomed the cuts, saying they are in line with international best practice. Nashua Communications CEO Andy Openshaw says the regulations "should bolster competition in the mobile and fixed voice markets".

"The new rates promote sustainable competition and support competitive pricing in the market," Openshaw says. — (c) 2014 NewsCentral Media

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## Vodacom, MTN's fears now a reality

Vodacom and MTN's vociferous campaigning against aggressive mobile termination rate cuts came to nothing. Cell C and Telkom Mobile to score

Staff Writer

January 29, 2014

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The Independent Communications Authority of South Africa (ICASA) unveiled the new call termination rates on 29 January 2014, which will see significant cuts to mobile termination rates over the next three years.

Call termination rates are what one operator charges another operator to terminate a call on its network. For example, if a Vodacom subscriber makes a call to an MTN subscriber, Vodacom will pay MTN to terminate that call on its network.

The current termination rate for mobile calls is R0.40 per minute, while fixed calls are charged between R0.19 and R0.12 per minute.

The latest mobile termination rates increases the asymmetry between Vodacom and MTN and the smaller operators – Cell C and Telkom Mobile.

Asymmetry means that the large operators (Vodacom, MTN) will pay the smaller operators (Cell C, Telkom Mobile) more to terminate a call on their network than the other way around. This will help the smaller operators to compete more effectively against the larger players.



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Icasa's new regulated rates for call termination are provided in the table below

| Year | Mobile termination rates |           | Fixed termination rates |       |           |       |
|------|--------------------------|-----------|-------------------------|-------|-----------|-------|
|      | Regulated rate           | Asymmetry | Regulated rate          |       | Asymmetry |       |
|      |                          |           | W0N                     | B0N   | W0N       | B0N   |
| 2014 | R0.20                    | R0.44     | R0.12                   | R0.16 | R0.13     | R0.21 |
| 2015 | R0.15                    | R0.42     | R0.12                   | R0.12 | R0.13     | R0.13 |
| 2016 | R0.10                    | R0.40     | R0.10                   | R0.10 | R0.13     | R0.13 |

W0N: Within Area Code | B0N: Between Area Codes

## Vodacom, MTN's fight comes to nothing

When Icasa announced in October 2013 that it wants to cut the costs of terminating a call on a mobile network to R0.10 over the next 3 years, Vodacom and MTN came out swinging

MTN warned that a sudden reduction in mobile termination rates can reduce the company's incentive to invest heavily in its network in rural areas and continue its subsidization of mobile phones

Vodacom in turn said that the reduction in mobile termination rates proposed by ICASA can have a profound impact on both their business and those of their suppliers, franchisees and other stakeholders

Vodacom further slated Icas's proposal to alter the current rate of asymmetry from a 10% differential to rates ranging between 95% and 160% over three years

These warnings from the two largest mobile operators came to nothing, and the regulator's final mobile termination rate regulations copied the draft proposal tabled in October last year.

## Cell C welcomes regulations

**Mothibi Ramusi**, Cell C's head of regulatory affairs, welcomed the new call termination regulations, saying that it will be good for competition in South Africa.

He said the latest cuts will place smaller mobile operators such as Cell C and Telkom Mobile in a better position to take on big guns like Vodacom and MTN, and will ultimately benefit consumers.

In an official statement from Cell C, acting CEO Jose Dos Santos said that the new call termination rates come as a relief. "We have over the last 18 months committed ourselves to leading price competition even at the expense of our own margins, while motivating to ICASA for pro-competitive relief," Dos Santos said.

"Without this intervention it was likely that the South African market would have continued to have been an effective duopoly to the detriment of the consumer, industry and the South African economy," said Dos Santos. "With the support of this regulation, the mobile market will continue to become more competitive on a sustainable basis."

Cell C said that by increasing its share of the market and putting further pressure on the dominant competitors, it is confident that it can drive access to more affordable communications for all South Africans, even those not on its network.

## This is not a victory for consumers: Vodacom

Vodacom is not happy about the call termination regulations, saying that their recommendation for a "reasonable reduction glidepath" was not accepted.

"Vodacom had also made representations to ICASA about the proposed asymmetry structure, which is now more aggressive to the detriment of Vodacom's customers and business," said Vodacom.

"We feel that the level of asymmetry is unjustified and that there is no clear basis for the differential. This asymmetry is clearly a subsidy for the smaller operators."

"We will be reviewing the potential impact both internally and externally. We will be in a better position to comment on the steps we will need to take to adjust our business model once that review has been completed," said Vodacom.

"We believe that the outcome today has been reached without following due process. A cost-based study, which is a prerequisite before reaching this type of decision, has not been conducted and shared with us. We will be considering our options in relation to this."

Vodacom CEO, **Shameel Joosub** said that he wished that he could say that this is a victory for the consumer, but it is far from it.

"This is a subsidy which in effect means that Vodacom will be charged more to call Cell C and Telkom Mobile than the latter will be charged to call Vodacom. This prejudices Vodacom's customers, and rewards those who have not invested in their networks at the expense of those who have," said Joosub.



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### BlackBerry: head of BBM business leaves company



BlackBerry said on Monday that Andrew Bocking, the executive in charge of its BBM instant messaging business, has left the company.

"We will consider our options in order to do our best to protect our customers and ensure that South Africa continues to get the network investment that it needs and deserves."

### Telkom welcomed the new call termination rates

Telkom welcomed the new call termination rates (CTRs), saying that it will substantially contribute to reducing the cost of communication and the consumer will be the biggest beneficiary.

"This brings the market closer to parity in termination rates, supporting the move to convergence between fixed and mobile services. Telkom has for many years subsidised the dominant mobile operators, and this move will begin to level the playing field," said [Minam Altman](#), Head of Strategy at Telkom.

"Telkom will pass on reductions to consumers and will communicate these savings once it has fully assessed the impact of the regulations," said Altman.

MTN was asked for comment on the new call termination regulations, but the operator did not respond by the time of publication.

### New termination rates provide for greater competition: Minister

The Minister of Communications, [Yunus Carrim](#), has also welcomed Icasa's new termination rate regulations, saying that the Ministry believes it will serve the country's interests.

"We would like to see these new rates contribute to consumers and business paying less to communicate and benefiting economic growth and job creation over time," Carrim said. "The high costs to communicate have deterred global and domestic investment in this country."

Carrim said that these rates provide for greater competition which they expect to lead to reductions in the cost to communicate.

"We understand that ICASA consulted extensively with all the parties and we feel that they should accept the outcomes. What some of them may lose in immediate profits will be exceeded by what they will gain in the medium and long term," Carrim said.

### More on call termination rates

[New call termination cuts announced](#)

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## Vodacom slams Icasa rates move

*The country's largest mobile operator has said it is considering its options after telecommunications regulator Icasa introduced call regulations that favour rivals Cell C and Telkom Mobile.*

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Shameel Joosub

The move by the Independent Communications Authority of South Africa (Icasa) to slash mobile inter-network call rates and to introduce aggressive fees skewed in favour of smaller operators will harm **Vodacom** and its customers, the operator said on Wednesday.

**Icasa** on Wednesday published final call termination regulations, with an aggressive level of "asymmetry" that will benefit **Cell C** and other operators with less than a 20% share of the market.

"We feel that the level of asymmetry is unjustified and that there is no clear basis for the differential. This asymmetry is clearly a subsidy for the smaller operators," Vodacom said in a statement.

"We believe that the outcome today has been reached without following due process. A cost-based study, which is a prerequisite before reaching this type of decision, has not been conducted and shared with us. We will be considering our options in relation to this."

Although Vodacom said it is "supportive" of lower termination rates, it said its "key request" to Icasa to take into account the "adverse impact" of lowering the rates on its customers, partners and suppliers has not been accepted.

"We will be reviewing the potential impact both internally and externally [and] will be in a better position to comment on the steps we will need to take to adjust our business model once that review has been completed," the company said.

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"Vodacom had also made representations to Icasa about the proposed asymmetry structure, which is now more aggressive to the detriment of Vodacom's customers and business."

Vodacom CEO **Shameel Joosub** said in the statement: "I wish I could say this is a victory for the consumer, but it is far from it. This is a subsidy which in effect means that Vodacom will be charged more to call Cell C and Telkom Mobile than the latter will be charged to call Vodacom. This prejudices Vodacom's customers, and rewards those who have not invested in their networks at the expense of those who have," he said.

"We will consider our options in order to do our best to protect our customers and ensure that South Africa continues to get the network investment that it needs and deserves."

**MTN** had not commented on the final regulations at the time of publication. Cell C and **Telkom** have welcomed the new rates, with both operators saying they will pass on benefits to consumers in the form of lower retail tariffs. — (c) 2014 NewsCentral Media

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## New mobile fees: good news, bad news

The industry is not overly optimistic about consumer benefit from ICASA's new interconnect fee structure.

By Bonnie Tubbs | 11 Feb 08 08:54:30 AM

Read in this story | Market mould | Waiting game

The Independent Communications Authority of SA's (ICASA's) [latest mobile termination rates](#) (MTRs) have elicited mixed industry reactions – with operators split down the middle with sentiments of opposition and enthusiasm – and analysts painting different pictures as to consumer benefit.

As with the telecoms regulator's [previous cuts](#) to mobile termination rates (MTRs), the latest reduction and what has been labelled "aggressive" asymmetry the industry waits in anticipation for mobile operators to pass on the perceived benefit. MTRs – or interconnect fees – are the fees operators pay each other to terminate calls on each other's networks.

However, considering Vodacom and MTN will, as of 1 March, pay more than double the amount they will have paid back to them from Cell C and Telkom Mobile, there is uncertainty over whether consumers' pockets stand to directly benefit this time around.



As of next month, interconnect fees will drop from the current 40c to 20c (which the smaller players will pay Vodacom and MTN to carry calls on their networks) – while Cell C and Telkom Mobile will be able to charge their larger counterparts 44c per call terminated on their networks.

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### Market mould

While ICASA cannot force operators to lower their tariffs, it expressly expects its latest interconnect regulations – which include a glide path to 2016 – to result in price reductions.



The authority says its goal is to promote effective competition, and it believes the barrier to a lack of effective competition is the high termination rate for off-net call prices. This, says ICASA, prevents effective retail price competition.

"ICASA therefore expects the reduction of the termination rates to be passed through to consumers, and this in turn will allow consumers to make informed choices about which network to subscribe to, depending on quality of service as well as effective pricing."

The new asymmetry rates (which will in 2016 result in smaller players paying four times less than dominant players pay them for interconnect) have been tagged a massive boon for Cell C and Telkom Mobile.



ICASA's latest interconnect fees will double operators' own termination rates. Translate into tariff models for consumers?

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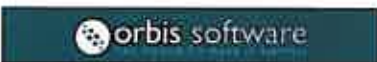


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As at September, Vodacom and MTN enjoy a 43% and 36% market share respectively while Cell C and Telkom Mobile hold 17% and 22% of the market respectively

## Waiting game

World Wide Worx MD Arthur Goldstuck says ICASA's latest MTRs are good news on one hand "The proposed glide path is exactly what we needed. It's making interconnect almost immaterial to the cost of calls – a cause we have argued for from as far back as 2005 when World Wide Worx and others campaigned for the price of MTRs to drop because it was just too high."

Goldstuck says ICASA's latest move is evidence that the authority does listen to the industry, and also shows the Department of Communications is serious about bringing down the cost of communications in SA.

Having said that, notes Goldstuck, "We face a three-year period where consumers won't benefit as much as would be hoped. Between now and 2016, asymmetrical MTRs remain at 40c or above and this counteracts the positive effect. The only benefit of the aggressive asymmetry is for the smaller networks, but consumers don't necessarily benefit."

"The point to be made here is that asymmetry means the average consumer won't benefit this time around. It may sound counter-intuitive, but consider that someone on MTN or Vodacom calling the smaller networks will make a call where the MTR remains where it was before. And that is going to be the case over the next three years, so the cost for 80% of the market won't come down."

Cell C – known as the consumer champion and instigator of the mobile price cut of 2012 – generally holds the industry's expectations when it comes to reacting to the lower MTRs with further per-minute cuts. This time around, however, analysts are not convinced this will be the case.

Goldstuck says he has heard talk that Cell C might not pass the lower interconnect fees on to consumers this time – but that it may rather invest in network expansion. In itself not a bad thing, he notes.

Ovum analyst Richard Hurst does expect some form of reaction from the operators – even if it does not amount to giant waves of change. He says it represents an opportunity for Cell C to start a serious marketing campaign to win subscribers. "It could [also] seriously assist in CEO Alan Knott-Craig's ambition of gaining 25% market share of revenues. Whether this is achieved or not, the new MTRs will help."

He says the new MTRs will provide "much-needed ammunition" to sustain the price war and thinks the likes of Cell C will pass the benefits on to the consumer sooner rather than later.

StrategyWorx CEO Steven Ambrose echoes Vodacom's sentiments that the new MTRs will not be all good news for consumers.

## Cell C and Telkom Mobile react

Cell C and Telkom Mobile have reacted to the new MTRs. Cell C says it will pass on the savings to its customers, while Telkom Mobile says it will use the savings to invest in its network. Both operators are expected to launch new services in the coming months.

He says, while dropping interconnect rates to around 10c makes sense over the period envisaged, and will bring costs down over time – the issue for many will be the asymmetry that was approved.

"At first glance it appears that Cell C and Telkom Mobile will score big. The key perspective is that the market is essentially saturated, with very little growth possible, especially in the voice market. MTRs only impact voice."

Ambrose notes MTRs are one component in the mix of retail pricing of mobile communication. "All the big operators will adjust their business models to take the new MTR rates into account and I believe this will focus the management of MTN and Vodacom on more innovative product offerings that allow greater margin. The

## Vodacom and MTN react

Vodacom and MTN have reacted to the new MTRs. Vodacom says it will pass on the savings to its customers, while MTN says it will use the savings to invest in its network. Both operators are expected to launch new services in the coming months.

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short-term impacts will be fully absorbed in a year's time and the big three operators by 2016 will be MTN, Vodacom and Cell C," he forecasts

Africa Analysis analyst Dobek Pater says the new MTRs are not really something consumers can be too excited about right now. He says it boils down to the discretion of the operators as to whether the pinch for consumers will be relieved at all.

"It is likely Cell C and Telkom Mobile will pass some benefit on, but Vodacom and MTN will probably only react if they really feel the pressure. If that doesn't happen, any price decrease [from the new MTR structure] will be marginal."

In considering the chances of Cell C dropping voice prices, Pater notes the price war the company instigated has taken its toll and there have been questions as to whether the price cuts the operator introduced make for sustainable operations.

"Depending on who you speak to, Cell C could be offering voice services at a tariff point that is not necessarily sustainable as it is

The company needs revenue that will turn profit so they can put money into their network."

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## Another mobile price war brewing in 2014?

The big question which may lead to a correction is whether Cell C and Telkom will trigger an aggressive pricing move on the market.

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Investors are playing a 'wait and see' game in the mobile space after the Independent Communications Authority of South Africa (Icasa) halved mobile termination rates at the end of January.

Starting in March 2014, MTRs will fall to 20 cents per minute from 40 cents, and will gradually decline over the next three years to 10 cents per minute.

MTRs are the amount mobile phone companies have to pay each other to terminate calls on another network.

The big question which may lead to a correction is whether Cell C and Telkom will trigger an aggressive pricing move on the market.

Nadim Mohamed, investment analyst and partner at First Avenue Investment Management noted that MTN and Vodacom have reverted back to the levels they were trading at in mid-December. "This after a strong run in the last few trading weeks of 2013."

Shares in Vodacom and MTN have both climbed since Icasa's announcement on 29 January, albeit marginally.



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"In my opinion, the market is in 'wait and see' mode with MTN and Vodacom and the signal that will prompt a correction is an aggressive pricing move from a Cell C or a Telkom Mobile," Mohamed said.

"It is not clear yet whether the smaller operators have appetite for another round of price competition," the analyst said.

#### Cell C and Telkom respond

Telkom said that the new termination rates would "substantially contribute to reducing the cost of communication and the consumer will be the biggest beneficiary".

"Telkom will pass on reductions to consumers and will communicate these savings once it has fully assessed the impact of the regulations," the group said after Icasa's announcement.

Cell C's chief financial officer, [Robert Pasley](#), told Techcentral that "Cell C's rates are already very competitive, so consumers shouldn't expect dramatic price reductions".

Cell C said in an official statement that the new rates will promote and foster a more balanced and competitive mobile industry to the benefit of consumers.

"By increasing its share of the market and putting further pressure on the dominant competitors, Cell C is confident it can drive access to more affordable communications for all South Africans, even those not on its network," Cell C said.

#### Further direction needed

Mohamed noted that MTN and Vodacom may well challenge Icasa legally as an effort to delay the MTR cuts in March.

"I expect that MTN and Vodacom will trade side-wards until there is more direction on two issues."

Mohamed commended Vodacom on excellent execution of its pricing transformation strategy in SA.

Vodacom shrugged off new call termination rates (CTRs) by announcing a 10.5% rise in group revenue to R20.2 billion for the quarter ended December 2013.

"The ability to manage elasticity through the new price plans has enabled it to retain subscribers and ARPU during a period of sharp declines in tariffs. It was so successful that they've even been able to attract new prepaid customers," the analyst said.

Vodacom said that group active customers grew 12.3% to 56.0 million.

Active prepaid customers increased by 5.7%, minutes of use grew by 21.5% and ARPU was flat at R80, while active contract customers grew 1.7% to 4.8 million, with ARPU declining 3.9% in the quarter to R393.

"MTN have been slow to react in terms of pricing strategy in SA and this has possibly resulted in loss of prepaid market share to Vodacom. As far as I can see, within the SA market, Vodacom are well ahead of MTN in its strategy to mitigate against the negative effects of MTR cuts/asymmetry," Mohamed said.

#### More on Vodacom and MTN

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[Vodacom lifts quarterly revenue by 10.5%](#)


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[Vodacom: MTRs could cost us R1 billion](#)

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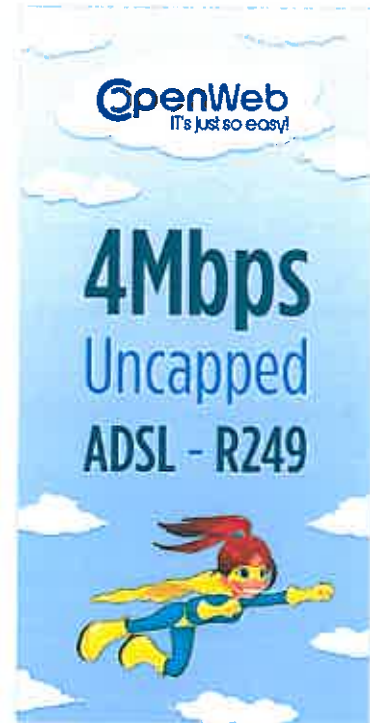
**Tags:** Cell C, First Avenue Investment Management, Headline, ICASA, MTN, Nadim Mohamed, Robert Pasley, Telkom, Vodacom

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To:

The Chairperson  
Of the Independent Communications Authority of South Africa

And To:

The Independent Communications Authority of South Africa  
Block A, B, C and D  
Pinmill Farm  
164 Katherine Street, Sandton

10 Fricker Road, Illovo Boulevard  
Johannesburg, 2196

PO Box 61771, Marshalltown  
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By e-mail to:

[info@icasa.org.za](mailto:info@icasa.org.za);[smncube@icasa.org.za](mailto:smncube@icasa.org.za);[mmodisane@icasa.org.za](mailto:mmodisane@icasa.org.za) (Secretary, Legal Department)**URGENT****URGENT**

Your reference

Our reference

Date

Stuart McCafferty  
2420953

10 February 2014

Dear Sir

**Mobile Telephone Networks (Pty) Limited ("MTN") and Independent Communications Authority of South Africa ("ICASA")**

1. We act for MTN.
2. We are instructed by MTN that:
  - 2.1 On 4 February 2014, ICASA published the Call Termination Regulations, 2014 in Government Notice 65 of 2014 ("the 2014 Regulations").

7262319

Senior Partner: DM Lancaster Partners: SM Adcock RB Africa NG Alp RL Appelbaum B Aronoff BA Baillie JH Bellow A Bennett HJ Bester  
DHL Booysse AR Bowley PG Bradshaw JI Buckland MS Burger RS Coelho KL Collier KM Colman KE Coster K Couzyn Z Dasoo JH Davies PM Daya  
JHB de Lange BEC Dickinson MA Diemont DA Dingley HF Dlamini KZ Dlothi HJ du Preez CP du Toit M Ebrahim SK Edmundson JC Els  
AE Esterhuizen MJR Evans GA Fichardt JB Forman CI Gouws JP Gouws PD Grealley SN Gumede VW Harrison JM Harvey MH Hathorn JS Henning  
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TA Versfeld DM Visagie JWL Westgate KL Williams RH Wilson M Yudaken Chief Operating Officer: SA Boyd

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2.2 With effect from 1 March 2014, the 2014 Regulations will determine the fees that MTN may charge for terminating calls on the MTN network and the fees that other mobile operators may charge MTN for terminating calls on their networks.

2.3 For the reasons summarised below, MTN contends that the 2014 Regulations are unlawful and irregular:

*Defects in the process*

2.3.1 On 29 October 2010, ICASA published the Call Termination Regulations in Government Notice 1015 of 2010 ("the 2010 Regulations"). The review of the 2010 Regulations was commenced prematurely by ICASA and in a manner which was inconsistent with regulation 8 of the Call Termination Regulations; ICASA failed to follow the process described in section 67(8)(a) of the Electronic Communications Act, 36 of 2005 ("ECA").

2.3.2 In order to undertake a review of the pro-competitive conditions imposed by the 2010 Regulations, ICASA was required to follow the process described in section 67(8)(a) of the ECA. This required ICASA to review the market determinations made on the basis of ICASA's 2010 analysis and to decide whether to modify the pro-competitive conditions. ICASA failed to do so. Instead, ICASA began its market analysis afresh in terms of section 67(4) of the ECA and did not review its existing findings as required by section 67(8). This had the result that ICASA failed to apply its mind to the proportionality enquiry mandated by section 67(8)(c) of the ECA.

*Lack of Procedural Fairness*

2.3.3 ICASA did not comply with the requirements of procedural fairness when it made the 2014 Regulations. ICASA, despite repeated requests, did not grant MTN access to the underlying cost data on which ICASA relied for the glide-path and asymmetrical rates in the Draft Call Termination Regulations published in Government Notice 1018 of 2013 ("Draft Regulations"). MTN was not furnished with any of the cost modelling allegedly used by ICASA to derive its target termination rates and the proposed asymmetry levels. This was grossly unfair, since it meant that MTN was deprived of any opportunity to engage meaningfully with ICASA. ICASA afforded MTN a single, one-on-one meeting before the 2014 Regulations were made. The meeting did not afford MTN a meaningful opportunity to be heard and did not comply with the requirements of procedural fairness.

*ICASA's Determination of Ineffective Competition*

2.3.4 There is no evidence to suggest that ICASA undertook, properly or at all, the collection, examination and analysis of appropriate empirical evidence in order to determine the effectiveness of competition. Further, its finding that "inefficient pricing" is the cause of market failure is irrational.

*ICASA's Market Definition*

2.3.5 ICASA alternates between two competing market definitions; the first is a wholesale market for call termination in which each operator has a 100%





market share and the second is a retail market in which each operator competes for revenue share from end-users. The use of competing market definitions is internally contradictory and irrational. Further, it is not apparent from the 2014 Regulations what is the relevant "retail market" or how "retail revenue market share" is to be calculated. In addition, since the reference to "retail revenue market share" is a new feature of the 2014 Regulations was not included in the 2010 Regulations or the Draft Regulations, MTN was never afforded an opportunity to explain to ICASA that the term has no readily ascertainable meaning.

*The Imposition of additional pro-competitive terms on MTN and Vodacom*

- 2.3.6 Regulation 7(3) provides that ICASA has to determine that: "*additional pro-competitive terms and conditions are necessary*" for MTN and Vodacom in relation to Market 1. These terms and conditions include the glide-path in table 1. The imposition of the glide path on MTN (and Vodacom) is irregular, for the following reasons:

- 2.3.6.1 Regulation 7(3) is void for vagueness;

- 2.3.6.2 The glide-path in Regulation 7(4) is not "cost-oriented"; the glide-path in Regulation 7(4) is unreasonable and disproportionate,

*Asymmetrical Rates for Licensees other than MTN and Vodacom*

- 2.3.7 Regulation 7(2) provides that all licensees "must charge fair and reasonable prices consistent with Appendix A". Reference is made therein to table 1 which is qualified by paragraph 2 of Appendix A.
- 2.3.8 The Asymmetry provisions are unlawful for the reasons that: paragraph 2 of Appendix A is void for vagueness; there is no justifiable basis for the asymmetry in table 1; the asymmetry in table 1 is arbitrary and irrational; the asymmetry in table 1 is unreasonable and disproportionate;
- 2.4 The coming into effect of the 2014 Regulations (which are unlawful and irregular) will cause irreparable harm to MTN.
3. In the premises, we are instructed further to demand from you, as we hereby do, that pending an application to the Court for an order (and its final determination):
- 3.1 Reviewing and setting aside Regulations 3(a), 4, 5, 6, 7(1), 7(2), 7(3)(a), 7(4)(a)(i), 7(4)(b), 8 and 9 of the 2014 Regulations as well as paragraphs 1 and 2 of Appendix A thereto ("the Offending Provisions"),
- 3.2 In the alternative, reviewing and setting aside ICASA's decision to make the Offending Provisions,

you furnish MTN, by 12:00 on 11 February 2014, with a written undertaking that you will defer the coming into effect of the Offending Provisions ("the Undertaking").

Handwritten signature and initials, possibly 'B' and '2B', in the bottom right corner.

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Page 4

4. We are also instructed to record that:
- 4.1 Pending the application for the review and setting aside of the Offending Provisions and its final determination, MTN tenders to pay into a trust account, on a monthly basis, the difference between (a) the net termination fees it would have paid under the 2014 Regulations and (b) the net termination fees it would have paid under the 2010 Regulations. At the end of the review, the amount in the trust account will then be distributed
- 4.2 MTN will not delay its application for the review and setting aside of the Offending Provisions but will co-operate with you fully so as to ensure that the matter is dealt with expeditiously. In this regard, we would expect the application for this relief to be launched by Friday, 14 February 2014.
5. Should you fail or refuse to furnish the Undertaking, MTN will make application **urgently** to the Court for appropriate *interim* and other relief.
6. We look forward to receiving your constructive response as a matter of urgency.

Yours faithfully

  
**WEBBER WENTZEL**

Stuart McCafferty

Direct tel: 011 530 5300

Direct fax: 011 530 6300

Email: [kalene.devos@webberwentzel.com](mailto:kalene.devos@webberwentzel.com)

ZB

**Kalene de Vos**

---

**From:** Kalene de Vos  
**Sent:** 10 February 2014 16:08  
**To:** 'info@icasa.org.za'; 'smncube@icasa.org.za'; 'mmodisane@icasa.org.za'  
**Subject:** Mobile Telephone Networks (Pty) Ltd and Independent Communications Authority of South Africa  
**Attachments:** SKMBT\_C45114021016060.pdf  
**Importance:** High

Dear Sirs,

Please see letter attached for your **urgent** attention. Please note that a formal response is called for by no later than 12:00 tomorrow (11 February 2014), failing which court proceedings will ensue forthwith.

Kind regards,

**Kalene de Vos**  
Legal Secretary

**WEBBER WENTZEL**

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E: [Kalene.deVos@webberwentzel.com](mailto:Kalene.deVos@webberwentzel.com)

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**To:** info@icasa.org.za; smncube@icasa.org.za; mmodisane@icasa.org.za  
**Sent:** 10 February 2014 16:09  
**Subject:** Relayed: Mobile Telephone Networks (Pty) Ltd and Independent Communications Authority of South Africa

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Subject: Mobile Telephone Networks (Pty) Ltd and Independent Communications Authority of South Africa

---

Microsoft Exchange



# RECEIPT BOOK

393

ICASA

No

2886

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Date: 10/02/14

Time IN: 17402

From which Company: Webber Wentzel Attorneys

Name of sender: Stuart McCafferty

Contact details: 011 530 5300

Descriptions of document/parcel: Letter - URGENT (enclosed in an envelope)

No. of documents: 02

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Department: ICASA

For office use: Mxani

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Signature: 

Signature:



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 Docex 6 Johannesburg  
 Email info@bowman.co.za  
 www.bowman.co.za

Our Reference: Livia Dyer / ICASA  
 Direct Line: 011 669 9334  
 E-mail Address: l.dyer@bowman.co.za

Your Reference: Stuart McCafferty  
 2420953  
 Date: 11 February 2014

BY EMAIL

Webber Wentzel  
 10 Fricker Road  
 Illovo Boulevard  
 Johannesburg  
 2196

Attention: Stuart McCafferty  
 Email: kalene.devos@webberwentzel.com

Dear Sir

## Independent Communications Authority of South Africa and Mobile Telephone Networks (Pty) Ltd

1. We act for the Independent Communications Authority of South Africa.
2. Our client has sent us a copy of your letter dated 10 February 2014.
3. We are currently taking instructions from our client and consulting with counsel and will respond to your letter by the close of business on Thursday, 13 February 2014.
4. Our client's rights are reserved.

Yours faithfully

  
 Bowman Gilfillan Inc  
 per: Livia Dyer

Bowman Gilfillan Inc. Reg No 1998/021409/21 Attorneys Notaries Conveyancers

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 JR Kaapu | AJ Keep | G Kekesi | CP Kennedy | FJ Khoza | U Kundile | JG Kruger | JP Kruger | R Labuschagne | HY Laher | T Laubscher | RA Leigh | DA Lotter | PM Maduna  
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 GI Rushton | JW Sahli | MY Saw | CG Schaller | DE Serchuk | LC Shawe | RZ Shein | CIC Smith | CD Stein | PW Stelling | R Straughan | BGM Strydom | V Subban | CYN Todd  
 CF Tucker | Cl van Heerde | RJ van Voore | NC van Zuylen | MG Vermaak | L Verster | SHE Voigt | DS Webb | DC Wesels | PE Whelan | CI Whitley | H Wilberich  
 SG Wilson | DD Yull | H Zondo-Kabin | MS Zungu | D Zussa Consultants V Mogg | A van Hoogstraaten **Special Counsel** MW Adcock | Cl Valkin  
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Your reference  
Livia Dyer/ICASA

Our reference  
Stuart McCafferty  
2420953

Date  
12 February 2014

Dear Sirs

## Mobile Telephone Networks (Pty) Limited ("MTN") and Independent Communications Authority of South Africa ("ICASA")

1. Thank you for your letter of 11 February 2014.
2. We note that you intend responding to our letter of 10 February 2014 by close of business tomorrow, Thursday, 13 February 2014, which, of course is beyond the date and time imposed by our client.
3. Be that as it may, we must advise you that our client will be launching its application today. It does so because your client has already made its position of opposition plain both to Parliament and to the world at large through the media (see this morning's Business Day) and because the matter is urgent.
4. We mention that in our letter of 10 February 2014 (para 4.1), we referred to a proposed payment regime. You will see from our client's papers that this has been modified so as to reflect a position which is more appropriate and effective.
5. Our client's application makes provision for relief in two parts. Broadly, in Part A it seeks urgent interim relief, suspending the regulations pending the determination of Part B, which is concerned with the review and setting aside of the regulations.
6. We continue to invite your client to defer the coming into effect of the regulations such that there would be no need to deal with Part A as a matter of urgency and the parties can then proceed to deal expeditiously with Part B.

7292281

**Senior Partner:** DM Lancaster **Partners:** SM Adcock RB Africa NG Alp RL Appelbaum B Aronoff BA Baillie JM Bellew A Bennett HJ Bester DHL Booysen AR Bowley PG Bradshaw JL Buckland MS Burger RS Coelho KL Collier KM Colman KE Coster K Couzyn Z Dasoo JH Davies PM Daya JHB de Lange BEC Dickinson MA Diemont DA Dingley NF Dlamini KZ Dlothi HJ du Preez CP du Toit M Ebrahim SK Edmundson JC Els AE Esterhuizen MJR Evans GA Fichardt JB Forman CI Gouws JP Gouws PD Grealy SN Gumede VW Harrison JM Harvey MH Hathorn JS Henning WA Hiepner KR Hillis NA Hlatshwayo XNC Hlatshwayo S Hockey CM Hoffeld PM Holloway MGH Honiball SJ Hutton R Ismail AR James KA Jarvis ME Jarvis CM Jonker S Jooste E Jordaan LA Kahn M Kennedy A Keyser P Kingston J Lamb PSG Leon DB le Roux L Marais T Masingi S McCafferty MC McIntosh SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu VS Moodaley L Morphet VM Movshovich MM Mtshali RA Nelson BP Ngoepe ZN Ntshona MB Nzimande GJP Olivier N Paige N Parbhoo AMT Pardini AS Parry S Patel GR Penfold SE Phajane C Pillay HK Potgieter D Ramjattan NJA Robb DC Rudman JCL Russell JW Scholtz KE Shepherd GM Sibanda DMJ Simaan AJ Simpson J Simpson N Singh MP Spalding L Stein PS Stein LJ Swaine ER Swanepoel Z Swanepoel A Thakor CK Theodosiou A Toefy D Vallabh PZ Vanda JP van der Poel SE van der Meulen ED van der Vyver M van der Walt N van Dyk MM van Schaardenburgh JE Veeran D Venter HM Venter B Versfeld MG Versfeld TA Versfeld DM Visage JWL Westgate KL Williams RH Wilson M Yudaken **Chief Operating Officer:** SA Boyd

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Page 2

7. We look forward to hearing from you.

Yours faithfully

**WEBBER WENTZEL**

Stuart McCafferty

Direct tel: 011 530 5300

Direct fax: 011 530 6300

Email: [kalene.devos@webberwentzel.com](mailto:kalene.devos@webberwentzel.com)

23



**From:** Angela Adam  
**Sent:** 12 February 2014 13:37  
**To:** 'l.dyer@bowman.co.za'  
**Cc:** Kalene de Vos  
**Subject:** RE: Mobile Telephone Networks (Pty) Ltd v ICASA [IWOV-WS\_JHB.FID1538540]  
**Attachments:** Letter.to.BowmanGilfillan.2014.02.12.pdf

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|           | 'l.dyer@bowman.co.za'  |                             |
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|           | '2420953 _ Mobile Termination Rates _ New Regulations Email' |                             |
|           | Kalene.deVos@webberwentzel.com                               | Delivered: 12/02/2014 13:37 |

Dear Mrs. Dyer

Please find enclosed correspondence for your perusal and consideration.

Yours faithfully

Angela Adam  
Associate

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**To:** l.dyer@bowman.co.za  
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[l.dyer@bowman.co.za](mailto:l.dyer@bowman.co.za)

**Subject:** RE: Mobile Telephone Networks (Pty) Ltd v ICASA [IWOV-WS\_JHB.FID1538540]

---

Sent by Microsoft Exchange Server 2007

A handwritten signature, possibly 'B', is written in the bottom right corner. Below it, the initials 'ZB' are written.

# Legal battle looms over cellphone fees

**BEKEZELA PHAKATHI**  
Political Correspondent

**CAPE TOWN** — The Independent Communications Authority of SA (Icasa) and two cellphone giants, Vodacom and MTN, are heading for a legal showdown over recently published fee regulations which could delay implementation of the fees and prejudice end-users.

Last month Icasa halved termination rates — fees that cellphone network operators charge their rivals to use their network — as part of a broader plan to reduce the cost of communication, which has long been regarded as among the highest in Africa.

MTN SA's CEO, Zunaïd Bulbulia, said yesterday the company had exhausted all avenues of engagement with the regulator and was left with no alternative but to pursue legal options.

"MTN supports a cost-based mobile-termination rate and takes a dim view to the asymmetry structure which is incongruent to what was initially proposed and threatens long-term viability and sustainability of the industry."

The regulator confirmed in Parliament yesterday that it had received a letter from MTN's lawyers stating that the "offending provisions" contained in the call termination regulations must be removed

as a matter of "urgency".

Nomvuyiso Baryi, a councillor at Icasa who deals with markets and competition, said the regulator had instructed lawyers to write back to MTN and make it clear the provisions would not be removed.

Ms Baryi said Icasa expected Vodacom to follow MTN's decision to challenge the regulations.

Ms Baryi told Parliament's communications portfolio committee that the implications of a court decision would depend on the process MTN would follow.

"If they just want to review the regulations, they (the regulations) will stand up until the court refers them back to us," Ms Baryi said.

Starting next month, mobile termination rates will fall to 20c a minute from 40c, and will gradually decline to 10c a minute over the next three years. But MTN and Vodacom will pay their smaller rivals, such as Cell C and Telkom Mobile, more than double the normal rate, according to the asymmetric termination rate. Vodacom has said that the asymmetric rate was "an aggressive and unjustified subsidy" for the smaller operators.

The cellphone giant last month indicated that it planned to launch a legal challenge against the regulator. Vodacom has reportedly said the planned cut in the mobile termination rates could cost it R1bn

in the 2015 financial year. Vodacom and MTN have in the past also cautioned that "aggressive" cuts could lead to job losses and reduced capital expenditure.

The Department of Communications said despite general reductions in prices across nearly all communication services "it is evident that prices remain relatively high".

On the sidelines of the meeting, Ms Baryi said a legal battle was expected and Icasa had already hired a senior counsel.

She said the likely challenge would be on the procedure that was followed leading up to the implementation of the regulations. phakathi@bdfm.co.za

25