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

CASE NO.

In the matter between :-

CELL C LIMITED

Applicant

and

**THE INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA**

First Respondent

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

Second Respondent

AMANDLA.MOBI

Third Respondent

CRYSTAL WEB MOBILE AND LEASP (PTY) LTD

Fourth Respondent

FREE MARKET FOUNDATION

Fifth Respondent

**INTERNET SERVICE PROVIDERS'
ASSOCIATION NPC**

Sixth Respondent

**LIQUID TELECOMMUNICATIONS SOUTH
AFRICA (PTY) LTD**

Seventh Respondent

MARK P LISTER

Eighth Respondent

**MOBILE TELEPHONE COMMUNICATIONS
(PTY) LTD**

Ninth Respondent

MWEB

Tenth Respondent

NATIONAL CONSUMER COMMISSION

Eleventh Respondent

**WIRELESS ACCESS
PROVIDERS' ASSOCIATION NPO**

Twelfth Respondent

TELKOM SOC SA LTD

Thirteenth Respondent

VODACOM (PTY) LTD

Fourteenth Respondent

NOTICE OF MOTION

PART A:

TAKE NOTICE that the applicant intends to make application before this honourable Court on **THURSDAY 7 JUNE 2018 at 14H00 or as soon thereafter as Counsel may be heard** for an order in the following terms:

- 1 Dispensing with the forms and service provided for in the rules of this Court and disposing of the matter by way of urgency in terms of rule 6(12)(a) of the Uniform Rules of Court;
- 2 Interdicting the first respondent from implementing the End-User and Subscriber Services Charter Amendment Regulations, Notice 233 of Government Gazette 41613 ("the Amendment Regulations") on 8 June 2018;
- 3 Directing the first respondent to publish in the Government Gazette a notice amending clause 8 of the Amendment Regulations to state that the Amendment Regulations will be brought into force six months after the date of publication of the notice;
- 4 Alternatively to prayer 3, directing that the first respondent engage with licensees within 30 days of this Order to determine a reasonable period within which licensees are to comply with the obligations imposed in the Amendment Regulations and, thereafter, to publish its decision on the implementation date of the Amendment Regulations by notice in the Government Gazette.
- 5 Directing the applicants to institute the review application contemplated in Part B of the notice of motion within 30 days' of this Order, failing which the interim interdict will lapse;
- 6 Ordering that any of the respondents who oppose the relief sought are to pay the costs of this application; and
- 7 Granting the applicants such further and/or alternative relief as this Court may

deem fit.

TAKE NOTICE FURTHER that the founding affidavit of GRAHAM NEIL MACKINNON and the accompanying annexures and confirmatory affidavits will be used in support of this application.

The applicants have appointed the offices of the FALCON HUME ATTORNEYS, as set out below, as the address at which it will accept all service and pleadings. Electronic service of pleadings may be effected at the following addresses:

☐ Heather Irvine: heather@fhinc.co.za

☐ Niel Jacobs: Niel@fhinc.co.za

TAKE NOTICE FURTHER that the time-periods in respect of Part A have been shortened. Should you intend opposing this application you are required to notify the applicant's attorneys by phone on 082 901-4574 or e-mail, on or before 10h30 on Thursday 6 June 2018:

- a) that you intend to oppose the application;
- b) in that notice appoint an address within 15 kilometres of the office of the registrar and an e-mail address at which you will accept notice and services of all documents and processes in these proceedings; and
- c) file your answering affidavit, failing which the matter may be heard in your absence and an order for costs may be made.

TAKE NOTICE FURTHER THAT in the event that you deliver any answering affidavit(s), the applicant will file its replying affidavit by **12h00 on Thursday 6 June**

2018 after receipt of such affidavit(s).

PART B:

TAKE NOTICE that the applicant intends to make application before this honourable Court on a date determined by the Registrar of this honourable Court for an order in the following terms:

- 1 Reviewing and setting aside clause 8 of the End-User and Subscriber Services Charter Amendment Regulations, Notice 233 of Government Gazette 41613 ("the Amendment Regulations"), in so far as it provides that the Amendment Regulations are to come into force "one-month after the publication in the Gazette".
- 2 The decision on the date upon which the Amendment Regulations are to come into force is remitted to the first respondent for determination.
- 3 Ordering that any of the respondents who opposes the relief sought are to pay the applicant's costs.
- 4 Further and alternative relief.

TAKE FURTHER NOTICE THAT the affidavit of GRAHAM NEIL MACKINNON together with the attached annexures will be used in support of this application.

TAKE FURTHER NOTICE that the Applicant has appointed the address of its attorneys of record, set out below, as the address at which it will accept service of all process, documents, and notices in these proceedings.

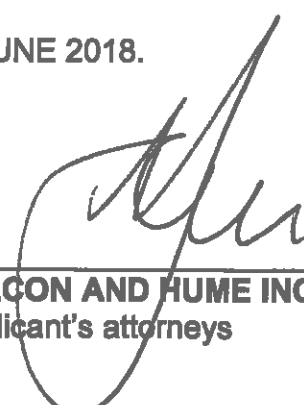
PLEASE TAKE NOTICE FURTHER that the respondents are hereby called upon to:

- (a) show cause why the decision should not be reviewed and set aside; and
- (b) dispatch to the Registrar of the above honourable Court, within fifteen days after receipt of this notice of motion, the record of the proceedings sought to be set aside, together with such reasons as are required by law or desirable to provide, and to notify the applicant that this has been done.

PLEASE TAKE NOTICE FURTHER that within ten (10) days of receipt of the record from the Registrar, the applicant may, by delivering a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the founding affidavit, in terms of rule 53(4) of the Rules of this honourable Court.

Take notice finally that if no notice of intention to oppose this application is given then, without further notice, the application will be moved on the tenth day following service upon you of this notice of motion or as soon as possible thereafter as Counsel may be heard.

DATED at Johannesburg this 6th day of JUNE 2018.


FALCON AND HUME INCORPORATED
Applicant's attorneys

2nd Floor, 8 Melville Road
Illovo, Sandton, 2196
Tel: 010 594 5000
Fax: 086 613 3471
Email: H Irvine heather@fhinc.co.za
niel@fhinc.co.za
Ref: P Smit / N Jacobs / MAT 1336

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**TO : THE REGISTRAR OF THE
ABOVE HONOURABLE COURT
JOHANNESBURG**

**AND TO:
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**
Executive Legal, Risk and CCC
Block D
Pinmill Farm
164 Katherine Street
Sandton
Gauteng
Email: info@icasa.org

**AND TO:
CHAIRPERSON, INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**
Executive Legal, Risk and CCC
Block D
Pinmill Farm
164 Katherine Street
Sandton
Gauteng
Email: info@icasa.org

**AND TO:
VODACOM PROPRIETARY LIMITED
(REGISTRATION NO: 1993 / 003367 / 07)**
Vodacom Corporate Park
082 Vodacom Boulevard
Voda Valley
Midrand
Gauteng
1685
Email: legal.collections@vodacom.co.za

**AND TO:
INTERNET SERVICE PROVIDERS' ASSOCIATION NON PROFIT COMPANY (SECTION
21)
(REGISTRATION NO: 2016 / 167416 / 08)**
C/o Charles Gracie
32 George Road
Glen Austin

Midrand
Email: queries@ispa.org.za

AND TO:
CRYSTAL WEB PROPRIETARY LIMITED
(REGISTRATION NO: 2014 / 081881 / 07)
7 Masefield Street
Farramere
Benoni
Gauteng
1501
Email: legal@crystalweb.co.za

AND TO:
MTN NETWORK SOLUTIONS PROPRIETARY LIMITED
(REGISTRATION NO: 1996 / 015935 / 07)
216 14th Avenue
Fairland
Roodepoort
Gauteng
Email: cim_legal@mtn.com

AND TO:
AMANDLA.MOBI NON PROFIT COMPANY (SECTION 21)
(REGISTRATIO NO: 2014 / 176307 / 08)
S14A
44 Stanley Avenue
Milpark
Gauteng
2092
Email: koketso@amandla.mobi

AND TO:
TELKOM SA STATE OWNED COMPANY LIMITED
(REGISTRATION NO: 1991 / 005476 /30)
Highveld Techno Park
61 Oak Avenue
Centurion
Gauteng
0157
Email: govsales@telkom.co.za

AND TO:
FREE MARKET FOUNDATION SOUTH AFRICA
Block 5
Bryanston Gate
170 Curzon Road
Bryanston
Email: fmf@mweb.co.za

AND TO:
LIQUID TELECOMMUNICATIONS HOLDINGS SOUTH AFRICA PROPRIETARY LIMITED
(REGISTRATION NO: 2016 / 272836 / 07)
401 Old Pretoria Main Road
Midrand
Gauteng
1685

Email: legal@liquidtelecom.co.za

AND TO:
MARK P LISTER
[insert address]
Email:

AND TO:
MWEB T/A A DIVISION OF INTERNET SOLUTIONS DIGITAL PROPRIETARY LIMITED
(REGISTRATION NO: 2000 / 021413 / 07)
Wanderers Building
The Campus
57 Sloane Street
Bryanston
Gauteng
2021
Email: legal@mweb.com

AND TO:
NATIONAL CONSUMER COMMISSION
Building C
South African Bureau of Standards Campus
Dr. Lategan Road
Groenkloof,
Pretoria
Email: E.Mohamed@thencc.org.za

AND TO:
WIRELESS ACCESS ASSOCIATION OF SOUTH AFRICA
(REGISTRATION NO: 58-776-NPO)
Email: secretariat@wapa.org.za

**IN THE HIGH COURT OF SOUTH AFRICA
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Second Respondent

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CRYSTAL WEB MOBILE AND LEASP (PTY) LTD

Fourth Respondent

FREE MARKET FOUNDATION

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INTERNET SERVICE PROVIDERS' ASSOCIATION NPC

Sixth Respondent

**LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY)
LTD**

Seventh Respondent

MARK P LISTER

Eighth Respondent

MOBILE TELEPHONE COMMUNICATIONS (PTY) LTD

Ninth Respondent

MWEB

Tenth Respondent

NATIONAL CONSUMER COMMISSION

Eleventh

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Respondent

WIRELESS ACCESS PROVIDERS' ASSOCIATION NPO

Twelfth Respondent

TELKOM SOC SA LTD

Thirteenth

Respondent

VODACOM (PTY) LTD

Fourteenth

Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

GRAHAM NEIL MACKINNON

do hereby make oath and say that:

1. I am an adult male and the Chief Legal Officer of the applicant ("Cell C"). Cell C has resolved to bring this application, and I am duly authorised to represent it and to depose to this affidavit.
2. The allegations contained in this affidavit are, save where the context indicates the contrary, within my personal knowledge and are true and correct. Where I make legal submissions, these are made on the advice of Cell C's legal representatives, which advice I accept as correct.
3. In this application Cell C seeks interim relief on an urgent basis in order to interdict the coming into force of the End-User and Subscriber Services Charter Amendment Regulations, published by ICASA on 7 May 2018 as Notice 233 of



Government Gazette 41613 ("the Amendment Regulations"), pending the determination of the rationality of the Regulations to be determined in a review application in due course. The Amendment Regulations are due to come into force on 8 June 2018, a mere month after their publication. This, in circumstances where compliance with the Amendment Regulations will require significant work by Cell C (discussed more fully below), which compliance cannot be achieved by 8 June 2018.

4. It has not been possible for Cell C to launch the main application as part of this application because of the urgency with which it has had to launch this application.
5. I am aware of the undesirable position in which Cell C has placed this Court, in instituting the application on one day's notice. However, as outlined below, Cell C sought to avoid at all costs the institution of proceedings against the national regulator. Its reasonable attempts at resolving the matter outside of court have led to unavoidable outcome of an application on short notice. Cell C has not been dilatory in its actions. Indeed, as will be shown in this affidavit, Cell C acted pro-actively to avoid precisely the situation that now faces it. And what faces it, is severe: since it knows that it will be unable to comply with the Amendment Regulations that are due to come into force on Friday, 8 June 2018 (despite its best efforts to ensure compliance), its normal and continued operation will be in contravention of the law from that day.

PARTIES TO THE APPLICATION

6. The applicant is Cell C Limited ("Cell C"), a company duly incorporated in terms of the company laws of South Africa, which has its registered office and principal

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place of business at Waterfall Campus, corner Maxwell Drive and Pretoria Main Road, Buccleuch, Gauteng.

7. The first respondent is the Independent Communications Authority of South Africa ("ICASA"), a juristic person established in terms of section 3(1) of the ICASA Act, which has its registered office and/or principal place of business at Blocks A-D, Pinmill Farm, 164 Katherine Street, Sandton, Gauteng. ICASA the author of the Amendment Regulations and the regulator responsible for the enforcement of the Amendment Regulations.
8. The second respondent is the Chairperson of ICASA, Mr Rubben Mohlaloga. He is cited in his official capacity under section 4(5) of the Independent Communications Authority of South Africa Act 13 of 2000 ("ICASA Act") as the person responsible for the overall leadership of the ICASA Council ("Council") and who manages the activities of the ICASA councillors. His address of service is ICASA, Blocks A-D, Pinmill Farm, 164 Katherine Street, Sandton, Johannesburg.
9. The third respondent is Vodacom Proprietary Limited (Registration Number: 1993 / 003367 / 07), a private company, duly registered and incorporated in accordance with the laws of South Africa, with its registered office and place of business at Vodacom Corporate Park, 082 Vodacom Boulevard, Voda Valley, Midrand, Gauteng, 1685;
10. The fourth respondent is Internet Service Providers' Association Non Profit Company (Section 21) (Registration Number: 2016 / 167416 / 08), a non-profit company, duly registered and incorporated in accordance with the laws of South Africa, with its registered office at 32 George Road, Glen Austin, Midrand;

11. The fifth respondent is Crystal Web Proprietary Limited (Registration Number: 2014 / 081881 / 07), a private company, duly registered and incorporated in accordance with the laws of South Africa, with its registered office and place of business at 7 Masefield Street, Farrarmere, Benoni, Gauteng, 150;
12. The sixth respondent is MTN Network Solutions Proprietary Limited (Registration Number: 1996 / 015935 / 07), a private company, duly registered and incorporated in accordance with the laws of South Africa, with its registered office and place of business at 216 14th Avenue, Fairland, Roodepoort, Gauteng;
13. The seventh respondent is Amandla.Mobi Non Profit Company (Section 21) (Registration Number: 2014 / 176307 / 08), a non-profit company, duly registered and incorporated in accordance with the laws of South Africa, with its registered office at S14A, 44 Stanley Avenue, Milpark, Gauteng, 2092;
14. The eighth respondent is Telkom SA State Owned Company Limited (Registration Number: 1991 / 005476 / 30), a state owned company, duly registered and incorporated in accordance with the laws of South Africa, with its registered office at Highveld Techno Park, 61 Oak Avenue, Centurion, Gauteng, 0157;
15. The ninth respondent is the Free Market Foundation South Africa with its place of business at Block 5, Bryanston Gate, 170 Curzon Road, Bryanston;
16. The tenth respondent is Liquid Telecommunications Holdings Proprietary Limited (Registration Number: 2016 / 272836 / 07), a private company, duly registered and incorporated in accordance with the laws of South Africa, with its



registered office and place of business at 401 Old Pretoria Main Road, Midrand, Gauteng, 1685;

17. The eleventh respondent is Mark P Lister;

18. The twelfth respondent is MWEB t/a a Division of Internet Solutions Digital Proprietary Limited (Registration Number:), a private company, duly registered and incorporated in accordance with the laws of South Africa, with its registered office and place of business at Wanderers Building, The Campus, 57 Sloane Street, Bryanston, Gauteng, 2021;

19. The thirteenth respondent is the National Consumer Commission with its registered office at Building C, South African Bureau of Standards Campus, Dr. Lategan Road, Groenkloof, Pretoria; and

20. The fourteenth respondent is Wireless Access Association of South Africa (Registration Number: 58-776-NPO);

21. The second to fourteenth respondents are cited only for the interest they may have in the outcome of this application. These respondents all made written representations on the proposed amendments to the End-User and Subscriber Service Charter Regulations, 2016 ("the Regulations") and several of these respondents attended the public hearings on the proposed amendments held on 1 and 2 March 2018. The coming into force of the Amendment Regulations is likely to have an effect on the operations of the affected respondents.

22. Cell C does not seek any relief from the second to fourteenth respondents.

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MATERIAL FACTS ON WHICH THE URGENT APPLICATION IS BASED

Introduction

23. This application follows upon the publication of the Amendment Regulations on 7 May 2018 and notice that the Amendment Regulations would come into force on 8 June 2018. Before dealing with the events following the publication of the Amendment Regulations, I deal with the development of the Amendment Regulations.

The development of the Amendment Regulations

24. The process goes back to 31 March 2017 when ICASA issued a request for information from stakeholders on out of bundle and data expiry practices within the industry.

25. Following a Workshop on Industry/Data Expiry Rules and Out-of-Bundle Data Billing held on 19 May 2017, ICASA published proposed amendments to the Regulations for public comment on 7 August 2017.

26. Cell C and other licensees participated in the regulatory process and made written representations in response to the proposed amendments within the 30-day period afforded to stakeholders by ICASA. In order not to unduly burden the Court I do not attached copies of the proposed amendments nor the written representations prepared by Cell C and submitted to ICASA. If required, these proposed amendments and submissions may be made available to the court at the hearing of this application.

27. On 17 November 2017, following the participation process, ICASA published a second draft of the proposed amendments to the Regulations and, again, invited written representations from stakeholders on the content thereof.

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28. Cell C and other licensees participated in the process and made written representations to ICASA.

29. On 1 and 2 March 2018 ICASA held public hearings on the content of the proposed amendments to the Regulations and Cell C attended the hearings and made further, supplementary written representations to ICASA. I attach as annexure "FA1" a copy of the Reasons Document for the Draft End-User and Subscriber Service Charter Regulations, 2018 (the Reasons Document), which outlines the public participation process followed and summarises the submissions ICASA received during the process.

30. On 26 April 2018 ICASA held a media briefing at which it stated its intention to publish the final amendments to the Regulations and that the amendment would enter into force within one month of publication in the Government Gazette.

Cell C's correspondence with ICASA

31. By 26 April 2018, Cell C did not have knowledge of what the content of the Amendment Regulations was to be nor when ICASA intended to gazette the proposed amendments. All that Cell C had available to it was a draft of the proposed amendments, and based on a consideration of those, it immediately took steps to ascertain whether Cell C would be in a position to implement the obligations placed on licensees, if the amendment to be published included the proposed contents of November 2017.

32. I pause at this point to outline the nature and ambit of the Amendment Regulations. The stated purpose of the Amendment Regulations is contained in the Reasons Document. It is to address general concerns regarding "data



expiry rules, high out-of-bundle rates and rules and also out-of-bundle voice and Short-Message-Service ('SMS') rules currently applied by licensees".

33. As such, the Amended Regulations introduce new obligations on licensees in respect of *inter alia*:

- 33.1. point of sale engagement with customers;
- 33.2. bi-annual reporting obligations on licensees to ICASA;
- 33.3. usage depletion notifications that must be sent to end-users at specified intervals in respect of (i) voice and SMS services; and (ii) data bundle services;
- 33.4. the option for end-users to roll over unused data before the data expiry date;
- 33.5. the option for end-users to transfer data to other end-users on the same network;
- 33.6. the obligation to carry out educational awareness campaigns on, at minimum, a quarterly basis. The educational awareness campaigns are to be aimed at education end-users on the use of smart phones, the use of data, and the products and services offered by the licensee.

34. These obligations are onerous. Following the media briefing of 26 April 2018, Cell C anticipated that it would have to do a substantial amount of work to secure compliance. Cell C immediately investigated the (then proposed and not yet published) technical changes and requirements it would need to implement in order to observe the obligations set out in the Amendment Regulations (If they

were to be in the form of the draft made available at the media briefing of 26 April 2018).

35. On 4 May 2018, having carried out this exercise, Cell C wrote to ICASA informing it, in essence, that:

- 35.1. That it had considered the proposed amendments to the Regulations, as published on the ICASA website, and noted that the amendments made provision that they would "come into force one (1) month after publication in the Gazette".
- 35.2. Cell C, in anticipation that proposed amendments as framed will be Gazetted, had undertaken an internal technical assessment and business analysis and had approached its external vendors and partners who manage and maintain Cell C's billing and technical platforms in order to determine the steps entailed and minimum timeframes necessary in order to implement the obligations prescribed in the proposed amendments.
- 35.3. Cell C's analysis indicated that the proposed amendments would require major changes and further developments to its billing and technical platforms, including software (source code) upgrades, business rule changes, and significant product offering changes and restructuring. Each of these changes needed to be scoped, tested, and integrated into the business and IT structure without compromising the existing technical platforms and provision of services. In order to achieve this any errors identified during the testing phase had to be resolved and the test conducted again, in order to ensure a seamless business, IT and service offering.



- 35.4. Cell C further pointed out that, unlike other licensees, it offers wholesale services to Mobile Virtual Network Operators (MVNOs), (like Virgin Mobile and FNB, who do not have their own network) and Mobile Virtual Network Enablers (MVNEs) (who host billing services on behalf of MVNOs) and Business Service Providers (BSPs) (like Internet Solutions and Huge). The MVNOs are hosted on Cell C's internal technical platform and external standalone technical platforms that would require significant upgrades and changes as a result of the proposed amendments. Cell C's wholesale partners had been requested to undertake a similar exercise to assess the changes they would need to implement on their platforms in order to ensure compliance with the proposed amendments.
- 35.5. For these reasons, Cell C informed ICASA that the implementation timeline of one month was technically impossible and Cell C would not be in a position to comply so short a timeframe. Where certain provisions of the proposed amendments were capable of implementation within a one-month period, Cell C recorded that it remained committed to meeting the imposed timeframe.
36. The letter underscored Cell C's commitment to implement the proposed amendments. In it, Cell C undertook to wait for the publication of the Amendment Regulations, which would enable it to have certainty as to the nature of the obligations imposed on licensees and to make a final assessment of the changes necessitated as a consequence thereof. I attach marked "FA2" a copy of the 4 May 2018 letter to ICASA, which must have placed beyond any doubt Cell C's predicament, namely that it must (and wishes to) comply with the law, but would be unable to do so if a reasonable time were not afforded it to ensure such compliance.
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37. Cell C did not receive a reply from ICASA to its letter.

38. On 7 May 2018 ICASA published the Amendment Regulations, a copy of which is attached as "FA3". The Amendment Regulations provided, in clause 8, that they would "come into force one (1) month after publication in the Gazette".

39. It was only by 7 May 2018 that it became known to Cell C that the Amendment Regulations would come into force on Friday, 8 June 2018.

Implications of the Amended Regulations on Cell C

40. Cell C immediately considered its position and conducted a commercial and technical analysis of the necessary steps that it would have to complete in order to comply with the Amendment Regulations by 8 June 2018. This necessitated engaging Cell C's stakeholders, including MVNOs, who are affected by the Amended Regulations.

41. This was an onerous task, given the complexity of the business operations concerned. The technical analysis could only proceed once the commercial analysis and implementation plan was completed and agreed upon.

42. The commercial implications entail that, for each of the obligations imposed on licensees in the Amendment Regulations, Cell C is obliged to ensure that all existing, legacy, new and planned products are in compliance with the Amendment Regulations.

43. Cell C has a list of approximately 119 primary products, with a number of secondary options under each product type (mobile bundle packages and data bundles), and all must be analysed, reviewed and changes effected to their respective terms and conditions of contract to meet the new regulatory requirements.

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44. The technical implications require that all Cell C billing and technical platforms (including business support systems and the technical front-end and back-end systems) are assessed to establish the changes requires and thereafter test those changes on the network before implementation. The testing period is critical as the network changes pose a risk, if not correctly implemented, that customers may be incorrectly billed or encounter poor quality service.

45. To avoid such an outcome a scope of work has been prepared and will be aligned to the commercial product requirements. This includes providing for various business specification requirements that set out the dependences, critical success factors, risks and limitations, detailed business rules, product requirements and terms and conditions. The following systems will require changes:

- 45.1. Customer relations management, including point of sale, call centres, customer profiles and options management, and product definitions.
- 45.2. Converged billing system, including real-time online billing for prepaid and post-paid customers, processing of billing and accounts, communication of notifications, enforcement of limits, and tariff definition.
- 45.3. Changes to the Middleware enterprise integration, which is a system used to integrate internal and external software applications.

46. In addition, the following Cell C systems requires changes and Cell C has prepared a high-level development project plan for its MVNO, MVNE and BSP wholesale network partners, dealing with:

- 46.1. Customer relationship manager;
- 46.2. Converged Billing Systems; and



- 46.3. Middleware enterprise integration system.
47. Cell C informed ICASA of these necessary processes in a letter dated 28 May 2018. I attach a copy of the letter marked "FA4".
48. The letter concluded that it was practically impossible for Cell C to conduct all the necessary commercial and technical changes to its systems within the one-month period afforded to it by ICASA. Cell C emphasised that this impossibility is not due to a lack of willingness on its part and that having conducted a scoping exercise and audit of the changes to be effected, believed that it required a period of six months to implement the changes in order to comply with the obligations in the Amendment Regulations. Cell C therefore requested an undertaking from ICASA that it would grant an extension of six months for the implementation of the Amended Regulations.
49. Cell C did not receive a response from ICASA to its 28 May 2018 letter.
50. On Monday 4 June 2018, Cell C's Executive Head: Regulatory, Mr Themba Phiri, contact an official at ICASA, Mr Leweng Mphahlele, to enquire whether ICASA had received Cell C's correspondence and whether ICASA is prepared to engage with Cell C in the date of implementation of the Amendment Regulations.
51. Mr Mphahlele indicated that the issue was scheduled for discussion at ICASA's weekly Council meeting scheduled to be held on Tuesday 5 June 2018. Cell C was hopeful that Cell C's concerns would be addressed at the Council meeting and that it would receive a written response from Council on the way forward and whether an undertaking would be granted to Cell C.
52. To date, Cell C has not received feedback from ICASA on the matter.



53. At this juncture, it must be pointed out that the time taken to assess the ability to comply alone is indicative of the extent of the work that would be required to ensure compliance with the Amendment Regulations that ICASA now wishes to implement with undue haste. That ICASA has not even deigned to respond to Cell C's extensive submissions on its inability to comply, or to suggest alternative approaches, smacks of an intention to forge ahead with the implementation of regulations in the knowledge that non-compliance will ensue.

54. On 5 June 2018 Cell C wrote a final letter to ICASA requesting a written undertaking that it grant an extension for the implementation of the Amendment Regulations and that it will publish a notice to delay the implementation of the Amendment Regulations in the Government Gazette and, further, that until such publication, ICASA will take no action against Cell C for any non-compliance with the Amendment Regulations, failing which it would have no alternative but to approach this Court on an urgent basis for interim relief.

55. Cell C has not received a response to its letter and accordingly, instituted the present application.

THE LEGAL BASIS FOR THE RELIEF SOUGHT

56. I set out firstly, the grounds on which Cell C approaches this honourable Court on an urgent basis and, thereafter, with the legal requirements for the grant of the relief sought by Cell C, namely an interim interdict pending the final determination of its rights and an order reviewing the decision by ICASA to bring the Amendment Regulations into effect within a period of one month of its publication.

URGENCY AND THE NEED FOR ABRIDGED TIME FRAMES

Handwritten signature and a mark resembling a stylized 'N' or a checkmark.

57. The main order seeks to set aside the implementation date of the Amendment Regulations to be heard in the ordinary course. As I explain below when I set out the harm Cell C apprehends it will suffer, should it not be granted interim relief, Cell C simply cannot wait that long for a determination of the matter.
58. Cell C has filed this application as expeditiously as possible, given the scope and nature of the issues concerned.
59. Cell C learnt on 26 April 2018 that the Amendment Regulations were to be published soon thereafter. At this date, the Amendments Regulations were not in final form and the information regarding the one-month implementation date was communicated via a media briefing.
60. Immediately on becoming aware of ICASA's intended approach on the implementation of the Amendment Regulations, Cell C engaged the ICASA and informed it of Cell C concerns regarding the practicality of implementing the obligations imposed in the Amendment Regulations within a one-month period after whatever publication date was decided upon.
61. In this communication of 4 May 2018, Cell C emphasised its commitment to implementing the Amendment Regulations and limited its concerns to the practical implementation steps it would need to carry out in order to ensure compliance with the provisions of the Amendment Regulations.
62. The fact that Cell C proactively engaged with ICASA on this matter and did not supinely wait for the promulgation of the Amendment Regulations before taking steps to engage ICASA meant that Cell C was in a position to afford ICASA ample opportunity to consider its submissions and engage with Cell C on

alternative options that are reasonable and objectively capable of compliance by licensees. Of course, ICASA did not respond at all.

63. I understand that other licensees have written similar correspondence to ICASA expressing their concern with the unreasonable implementation date of the Amendment Regulations. I do not however have a copy of this correspondence and am unable to confirm the exact nature and content thereof.

64. Following the publication of the Amendment Regulations on 7 May 2018, Cell C's concerns regarding the implementation date were realised.

65. It is understood that in order to engage ICASA in a substantive manner with concrete evidence of the impracticalities of the one-month implementation timeframe, it would have to conduct its own audit of necessary steps, prepare a scope of work for changes to be effected and would need to consider both the commercial and technical changes that are required as a consequence of the Amendment Regulations. This is an intensive and complex exercise which Cell C completed within a three-week period and resulted in Cell C's letter to ICASA of 28 May 2018.

66. Cell C acted diligently and in a sincere effort to do all that was possible to prepare itself for compliance with the Amendment Regulations.

67. Cell C telephonic engagement with Mr Mphahlele of ICASA gave Cell C further hope that litigation could be avoided and that a satisfactory resolution that accommodated Cell C's concerns could be reached at the Council meeting on Tuesday 5 June 2018. This was not to be.

68. When Cell C realised that ICASA was not prepared to engage with it on this issue it was forced to threaten litigious proceedings against ICASA.



69. To this attempt to avoid litigation, ICASA has again not responded.
70. As the Amendment Regulations come into force on Friday 8 June 2018, Cell C has had no alternative other than to approach this Court on extreme urgency.
71. It is essential that clarity be obtained urgently on whether licensees, and particularly Cell C, will be held to be in non-compliance with regulatory prescripts as of 8 June 2018, in circumstances where Cell C has informed ICASA that it is practically impossible for it to comply with the time frame set out in the Amendment Regulations.
72. In circumstances where ICASA has failed to respond or to engage in any way with Cell C, it is incumbent that this Court intervene and delay the implementation of the Amendment Regulations for a period that is reasonable in the circumstances taking into account the intensive commercial and technical work required of licensees to properly implement the Amendment Regulations.
73. This is in addition to the fact that it is important that the Amendment Regulations are brought into effect in a manner that is seamless for customers and end-users and that no disruption in the provision of services or the integrity of billing services is experienced.
74. The application is being launched as soon as is practically possible, having regard to the facts of the case. As is clear from the foregoing, Cell C has made efforts to avoid the bringing of this application from even before the publication of the Amendment Regulations. To that end, an undertaking was sought. It will be argued more fully at the hearing of this application that Cell C launched the application within a reasonable time having regard to the circumstances of the case.
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75. An applicant cannot legitimately be criticized for attempting to resolve a matter amicably before resorting to litigation. It is an accepted principle in our law that, where an applicant first seeks compliance from the respondent before lodging an application, it cannot be said that the applicant had been dilatory in bringing the application or that the urgency is self-created.

76. Accordingly, Cell C seeks to depart from the ordinary rules regarding services in the following manner:

76.1. Service will be effected by Cell C's attorneys to avoid delay that may ordinarily be experienced by service by sheriff.

76.2. All respondent's will have until 10h30am on Thursday 7 June 2018 within which to file their opposition, if any.

76.3. Cell C will have until 12h00 to file its replying affidavit, if any.

77. These extremely abridged timelines are ameliorated by the fact that Cell C seeks relief of a limited nature and no real prejudice is contemplated to ICASA, in circumstances where it has been aware of the substance of this application at least since 4 May 2018.

PRIMA FACIE RIGHT

78. Cell C is a licensee regulated by ICASA and holds an electronic communications network service licence and an electronic communications service licence. It has a demonstrable right to the interim relief sought in that it has a regulatory compliance interest to protect as well as a commercial and reputational interest that is at stake.

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79. The imposition by ICASA of a one-month period for compliance with regulations is virtually unprecedented. ICASA as the national regulator is well aware of the complexity of licensees' operations and, in appreciation thereof, has in the ordinary course imposed reasonable time frames within which compliance is expected. The present deviation from ICASA ordinary conduct is inexplicable.
80. The wholly unreasonable period imposed by ICASA without any explanation amounts to irrational conduct by ICASA and is reviewable and falls to be set aside under section 6(2) of the Promotion of Administrative Justice Act, 2000. A review application on this basis (and any other basis upon which a review may be based in the circumstances of the case) will be launched in due course.
81. This is to be considered against the fact that ICASA has carried out the amendment process over a one-year period, from its commencement on 31 March 2018 until its promulgation on 7 May 2018. Having taken over 12 months to promulgate the Amendment Regulations, it is unreasonable for ICASA to impose on licensees a one-month period within which to comply with the obligations contained in the amendments.
82. This conduct by ICASA is to be balanced against the rights of Cell C as a licensee committed to carrying out its operations within the confines of the regulatory environment and the commercial and reputational interests that flow therefrom.
83. In the absence of reasonable conduct by ICASA in affording Cell C a meaningful opportunity to engage, its' rights remain worthy of protection.



WELL-GROUNDED APPREHENSION OF IRREPARABLE HARM

84. In the event this Honourable Court declines to grant the relief sought, Cell C will be in non-compliance with regulatory and statutory prescripts. It will face ICASA issuing to it a notice of non-compliance in accordance with section 74 of the Electronic Communications Act, 2005 and may be referred to the Compliance and Complaints Committee of ICASA.

85. Should Cell C be determined to be acting in contravention of the Amendment Regulations, it may be subject to a monetary sanction of up to R 5 million.

86. In addition, should customers and end-users experience disruption in service or irregularities in their billing service as a result of Cell C's rushed attempt to comply with the obligations in the Amendment Regulations, this will foreseeably result in loss of confidence in the Cell C brand and product offering and a consequential potential loss in customer base.

87. In a highly competitive market like that of mobile network service providers, such loss in confidence is extremely difficult to ameliorate in the market and damage of this nature is largely irreparable.

88. The reputational harm experienced by any licensee that is acting in non-compliance with its national regulator is difficult to underestimate.

THE BALANCE OF CONVENIENCE FAVOURS THE GRANTING OF AN INTERIM INTERDICT

89. The relief sought in Part A of the notice of motion is limited in nature and seeks only to delay the implementation date of the Amendment Regulations.

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90. In order to ensure that there is no unnecessary delays in the filing of the affidavit in Part B of the notice of motion, Cell C undertakes to file the affidavit within 30 days of this Court's order, should the interim interdict be granted.

91. The balance of convenience clearly favours the applicants in this regard. Any inconvenience that may be experienced by ICASA is limited solely to a delay in bringing into force the Amendment Regulations and no prejudice can be said to occur in relation to ICASA's general policy or internal management. To the extent that ICASA may regard the any delay as prejudicial, Cell C submits that the delay is primarily a result of ICASA's failure to correspond or engage with Cell C since 4 May 2018.

92. The bottom line is this: whether or not the operation of the Amendment Regulations is suspended, Cell C will not be in a position to comply with the standards imposed thereby. ICASA gains nothing by insisting that regulations that are not capable of being complied with be brought into operation; Cell C, on the other hand faces the adverse consequences herein described.

THE APPLICANTS HAVE NO OTHER SATISFACTORY REMEDY

93. Cell C has sought to engage ICASA as soon it received news of the ICASA media briefing, to no avail. Cell C is the national regulator and the only party that can assist Cell C by suspending the implementation of the Amendment Regulations. It has not even shown Cell C the courtesy of responding to its numerous and extensive correspondence on the issue.

94. Cell C has sought to avoid litigation with ICASA, as the national regulator, and has engaged ICASA in writing with substantive reasons supported by detailed facts as to its concerns with the one-month implementation period.

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95. Cell C approaches this Court as a licensee subject to the regulatory oversight, in circumstances where the regulator is not prepared to hear Cell C's legitimate concerns and is in a position power to impose significant penalties on Cell C for non-compliance with regulatory provisions that are unreasonable and irrational in the circumstances of the case.

96. ICASA's stance is clearly articulated by its continued refusal to engage with Cell C's concerns.

97. As such Cell C has no alternative recourse but to approach this Court for urgent relief.

WHEREFORE the applicant prays for relief as set out in Part A of the Notice of Motion to which this affidavit is attached.



GRAHAM NEIL MACKINNON

I CERTIFY that this affidavit was signed and sworn to before me at ~~Sandton~~ on this the ^{6th} day of JUNE 2018, by the deponent who acknowledged that he knew and understood the contents of this affidavit, had no objection to taking this oath, considered this oath to be binding on his conscience and who uttered the following words: "I swear that the contents of this affidavit are true, so help me God".



COMMISSIONER OF OATHS

Name:

Address:

Capacity:

LEANA ENGELBRECHT

Commissioner of Oaths

Practising Attorney R.S.A.

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**REASONS DOCUMENT FOR THE END-USER AND
SUBSCRIBER SERVICES CHARTER AMENDMENT
REGULATIONS, 2018**

1. Introduction

- 1.1. On 7 August 2017, the Independent Communications Authority of South Africa ("Authority") published a notice of its intention to amend the End-User and Subscriber Service Charter Regulations of 2016 (*Government Gazette* 39898), under General Notice No. 822 in the *Government Gazette* 41030 ("the first draft EUSSC Regulations") and invited public comments to be made within a period of thirty (30) working days¹.
- 1.2. This amendment was necessitated by general concerns raised by various stakeholders, including consumer groups and social media campaigns, with regards to data expiry rules, high out-of-bundle rates and rules and also out-of-bundle voice and Short Messaging Service ("SMS") rules currently applied by licensees.
- 1.3. The aforementioned concerns range from consumer complaints about the unfairness arising from the expiry of data bundles or the forfeiture of unused data if not used within a particular period prescribed by the licensee to pronouncements by parliament and other authorities to the effect that these industry rules and/or practices prejudice consumers and are perceived to be contrary to the provisions of section 63 of the Consumer Protection Act No 68 of 2008 ("CPA"). In addition, consumers have raised concerns about 'open line' of post-paid, hybrid and prepaid tariff plans being susceptible to being charged high out-of bundle rates when once-off or recurring bundles are depleted.
- 1.4. To address the above mentioned concerns, the first draft of the EUSSC Regulations proposed, among others, the following provisions to empower end-users:
 - 1.4.1. Notifications of voice, SMS depletion to be sent to the end-users at set intervals and also provision for end-users on post-paid / hybrid plans to purchase additional services upon such depletion or be disconnected if end-users do not buy additional bundles.

¹ The due date for submission of written representations was 19 September 2017.

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- 1.4.2. End-users to be given an option to opt-in or out of out-of-bundle charges to minimise bill shock.
 - 1.4.3. The expiry of data bundles is to be linked to the bundle size, with the shortest being ten (10) days for bundles between 1 Megabyte and 50 Megabytes, and the longest being twenty-four (24) months for 20GB and above.
 - 1.4.4. Allowance for the roll-over of unused data when an end-user recharges prior to the expiry date.
 - 1.4.5. Licensees to conduct quarterly consumer education and awareness to educate end-users on the use of smart phones, use of data and provision of information on the broad range of products and services offered.
- 1.5. The Authority received written representations² on the first draft EUSSC Regulations from:-
- 1.5.1. Cell C;
 - 1.5.2. Telkom;
 - 1.5.3. MWEB;
 - 1.5.4. MTN;
 - 1.5.5. Vodacom;
 - 1.5.6. South African Communications Forum;
 - 1.5.7. Joris Stork;
 - 1.5.8. Nonkululeko Abavana;
 - 1.5.9. KE Mokone;
 - 1.5.10. Liquid Telecom (formerly known as Neotel);
 - 1.5.11. Ivan Roux;
 - 1.5.12. Nhlakanipho Zuma;
 - 1.5.13. JP du Plessis;
 - 1.5.14. Mr M.P. Yates;
 - 1.5.15. PA du Plessis;

² The National Consumer Commission made a presentation on the amendment to the first EUSSC Regulations to the End-user and Subscriber Charter Council Committee on 14 September 2017. However, the National Consumer Commission did make a written representation on the Regulations.

- 1.5.16. Izak Nothling;
 - 1.5.17. Johan Kriel;
 - 1.5.18. Ofentse Maloba;
 - 1.5.19. Jo-Anne Stolp; and
 - 1.5.20. SANCU.
- 1.6. After taking into account written submission on the first draft EUSC Regulations, the Authority published the second draft End-User and Subscriber Service Charter Regulations under General Notice No. 629 in the *Government Gazette* 41263 of 17 November 2017 ("the second draft EUSC Regulations") for further public comments for a period of thirty (30) working days.³
- 1.7. The second draft EUSC Regulations proposed new provisions in respect of the minimum validity period of three (3) years for prepaid data bundles and the roll-over and transfer of unused post-paid data.
- 1.8. The Authority received representations⁴ on the second draft EUSC Regulations:-
- 1.8.1. Amandla.mobi;
 - 1.8.2. Cell C;
 - 1.8.3. Crystal Web Mobile & LEASP;
 - 1.8.4. Free Market Foundation;
 - 1.8.5. ISPA;
 - 1.8.6. Liquid Telecom;
 - 1.8.7. Mark Lister;
 - 1.8.8. MTN;
 - 1.8.9. MWEB;
 - 1.8.10. National Consumer Commission;
 - 1.8.11. Telkom;
 - 1.8.12. Vodacom; and
 - 1.8.13. WAPA.

³ The due date for submission of written representations was 3 January 2018.

⁴ <https://www.kasa.org.za/pages/end-user-and-subscriber-service-charter-regulations>

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- 1.9. The Authority published a media release on its website⁵ on 26 February 2018 with respect to the public hearings to be held on the second draft EUSSC Regulations which were held on 01 and 02 March 2018.
- 1.10. The Authority published a schedule of the aforementioned public hearings on the second draft End-user Regulations on its website⁶ on 26 February 2018.
- 1.11. All interested parties, except Mark Lister and MWEB⁷, who submitted written representations on the second draft EUSSC Regulations participated in the public hearings.
- 1.12. After the public hearings the Authority received supplementary written representations on the second draft EUSSC Regulations from the following stakeholders:-
- 1.12.1. Cell C;
 - 1.12.2. Vodacom;
 - 1.12.3. ISPA;
 - 1.12.4. Crystal Web;
 - 1.12.5. MTN;
 - 1.12.6. Amandla.mobi; and
 - 1.12.7. Telkom.

⁵ <https://www.icasa.org.za/news/2018/icasa-to-hold-public-hearings-in-respect-of-the-second-draft-of-the-end-user-and-subscriber-service-charter-regulations>

⁶ <https://www.icasa.org.za/news/2018/schedule-for-public-hearings-on-the-draft-end-user-and-subscriber-service-charter-regulations>

⁷ Both Mark Lister and MWEB confirmed via email their unavailability to participate in the public hearings.

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2. Legislative Framework

2.1. The amendment of the End-User and Subscriber Service Charter Regulations of 2016 was made in terms of section 4 read with section 69(3) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) ("ECA").

2.2. Section 4(1) of the ECA stipulates as follows:

"The Authority may make regulations with regard to any matter which in terms of this Act or the related legislation must or may be prescribed, governed or determined by regulation." (our emphasis)

2.3. Section 69(3) of the ECA stipulates as follows:

"The Authority must, as soon as reasonably possible after the coming into force of this Act, prescribe regulations setting out the minimum standards for end-user and subscriber service charters."

2.4. Furthermore, section 69(5) of the ECA stipulates that:

"The matters which an end-user and subscriber service charter may address include, but are not limited to—

- (a) the provision of information to end-users and subscribers regarding services, rates, and performance procedures;*
- (b) provisioning and fault repair services;*
- (c) the protection of private end-user and subscriber information;*
- (d) end-user and subscriber charging, billing, collection and credit practices;*
- (e) complaint procedures and the remedies that are available to address the matters at issue; and*
- (f) any other matter of concern to end-users and subscribers."*

3. Submissions received on the second draft EUSC Regulations and the Authority's response

3.1. Amendment to regulation 1

3.1.1. Submission Received

3.1.1.1. Liquid Telecom queried the reasons for the deletion of definitions "Service activation" and "Service Activation Time" and stated that it believes that the definitions provide guidance for stakeholders in complying with regulation 9(5) of the second draft EUSC Regulations.

3.1.1.2. Liquid Telecom indicated that references to "post-paid plans" and "hybrid plans" were not defined and may therefore be subject to interpretation.⁶

3.1.1.3. Vodacom stated that there were additional items that required definitions such as "out-of-bundle", "allocated data", "session" and "disconnection".

3.1.1.4. WAPA suggested that the Authority include the definitions for "prepaid" and "post-paid" so licensees can be clear on which subscribers fit into which category.

3.1.1.5. Cell C did not agree with the definition of "data bundle" and suggested that the definition refers to "bytes" and "connectivity for purposes of the Internet."

3.1.2. The Authority's Decision

3.1.2.1. The Authority is of the view that the definitions for "Service activation" and "Service Activation Time" should not be included in the Regulations as these terms were not used in the body of the Regulations.

⁶ Liquid Telecom submission Para 14.4 Page 5

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3.1.2.2. The Authority included a definition for "post-paid plan" as suggested by WAPA as well as a definition for "hybrid plan" as suggested by Liquid Telecom.

3.1.2.3. The definition of "prepaid" was not included in the Regulations as it was not used in the body of the final Regulations.

3.2. Amendment to regulation 5

3.2.1. Submission Received

MWEB stated that it believed that fair usage policies should only be included in promotional material insofar as the policy of the promotion differs from the usual policy.

3.2.2. The Authority's Decision

The Authority is of the view that the inclusion of fair usage policies in respect of promotions will empower end-users to make informed decisions, and as such are to be included at all times.

3.3. Amendment to regulation 8

3.3.1. Submissions Received

3.3.1.1. ISPA recommended that regulation 8 be amended due to the deletion of sub-regulation 7(a).

3.3.1.2. Liquid Telecom was concerned that the deletion of regulation 8(7)(b) would have harmful consequences to consumers.

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3.3.2. The Authority's decision

The Authority is of the view that these provisions have been catered for under the Code of Conduct for Premium Rated Services Regulations and as such should not be included in the Regulations.

3.4. Insertion of regulation 8A(1)**3.4.1. Submissions Received**

3.4.1.1. Liquid Telecom indicated that the proposed usage notifications would only be applicable in the context of mobile services. Liquid Telecom further indicated that there are different platforms available for consumers to monitor their data usage and that it should be a consumer's responsibility to monitor usage using these platforms.

3.4.1.2. MTN stated that the Authority did not specify whether or not the proposed amendment would apply to prepaid or post-paid end-users. Furthermore, MTN stated that the provision of voice and SMS usage notification intervals of 50%, 75%, 90% and 100% may be excessive and irritate end-users. MTN was of the view that the proposed usage notification should be left to the discretion of licensees.

3.4.1.3. Vodacom submitted that the content of the notification and the "percentage depletion" notification ought not to be prescribed. Vodacom was of the view that end-users will not benefit from the proposed "percentage depletion" notification and that it will likely confuse rather than to assist end-users. Vodacom proposed a notification which would record the bundle units remaining (i.e. voice or SMS), for which it believes it would enable end-users to manage and control their usage and to proactively plan for the purchase of additional bundles or units if they so require. Vodacom suggested that a maximum of two notifications should be given to end-users before they have reached the 90% threshold of usage for services as end-users will be given sufficient time to respond after such notifications. However, Vodacom pointed out that a number of devices that use

voice and SMS services (specifically for M2M applications) do not have the facility to view such notifications.⁹

3.4.1.4. Cell C stated that it was not clear on why voice and SMS services were included in the Regulations. Cell C was of the view that the Regulations should deal with data services, not voice and SMS.

3.4.1.5. Telkom stated that it did not support the proposed percentage depletion usage notifications with respect to voice and SMS usage. Telkom proposed that the provision be adjusted to allow for actual value of data remaining instead of percentages.

3.4.1.6. Mr Mark Lister stated that usage notifications should be provided by licensees at no charge to end-users. Mr Lister further stated that the timing of the proposed usage notifications was not guaranteed and the end-user might not be able to read the messages and react timeously.¹⁰

3.4.2. The Authority's Decision

3.4.2.1. The Authority is of the view that the said notifications are necessary to empower end-users to monitor usage and limit spend to avoid or minimise bill shock as a result of out-of-bundle charges.

3.4.2.2. The Authority, however, agrees with the licensees' views that percentage depletion usage notifications, rather than the relevant unit of measure, will more than likely confuse rather than assist end-users.

3.4.2.3. The Authority has modified regulation 8A(1) accordingly. Licensees are therefore required to send notifications to end-users which records the voice and SMS bundle units remaining instead of percentage of units remaining.

⁹ Vodacom submission Para 11-18 Page 3-5

¹⁰ Mr Lister submission Page 2

3.4.2.4. The Authority has decided to reduce the usage notification percentage triggers to a minimum¹¹ of three notifications (i.e. 50%, 80% and 100% depletion) to minimise or avoid the risk of too many notifications, which could potentially confuse customers or result in customers ignoring them.

3.5. **Insertion of regulation 8A(2)**

3.5.1. **Submissions Received**

3.5.1.1. MTN was of the view that this regulation was not necessary as prepaid, hybrid or post-paid users were able to purchase or load additional airtime or SMS bundles.

3.5.1.2. Vodacom was of the view that this regulation should make it clear that the "option to buy" was not to be provided only upon depletion of the services but at any time, so as to avoid disruptions of service.

3.5.1.3. Telkom submitted that it supported this provision as it offered voice and SMS bundles to its subscribers through its self-service menu, its online portal and through the USSD option.

3.5.1.4. Cell C stated that its post-paid subscribers are already offered additional services upon depletion of allocated voice and SMS services.

3.5.2. **The Authority's Decision**

The Authority is of the view that this option is necessary as some of the operators do not provide post-paid users with an option to buy additional voice or SMS services, which may result in post-paid users paying out-of-bundle rates.

¹¹ Licensees can increase the number of alerts, if deemed necessary.

3.6. Insertion of regulation 8A(2)

3.6.1. Submissions Received

- 3.6.1.1. MTN indicated this provision was too prescriptive and did not consider interventions put in place by licensees (i.e. usage limit) to empower end-users to control and limit their spend.¹² MTN further indicated that by providing post-paid users with an option to be disconnected from accessing relevant services upon depletion of voice and or SMS bundles, the Authority was interfering with the design of its post-paid/hybrid products and is not authorised in terms of section 69(5) of the ECA.¹³
- 3.6.1.2. Vodacom submitted that this regulation was unclear as to what was the default position when the end-user fails to choose from the options provided. Vodacom stated that licensees were obliged to continue providing the services and applicable out-of-bundle rates would apply. Vodacom stated that it was unclear as to when these notifications should be sent out to the end-user (i.e. at the time of or after the depletion of the allocated services).
- 3.6.1.3. Vodacom indicated that this regulation was *ultra vires* as it amounted to the prescription of the basic product and service offering and associated price modelling, by effectively excluding a particular product offering, which is beyond what section 69 of the ECA empowers.¹⁴
- 3.6.1.4. Vodacom stated that unlike data services, voice and SMS services are used intentionally by end-users and therefore, there was unlikely to be instances of bill shock as suggested by the Authority.¹⁵
- 3.6.1.5. Vodacom stated it was technically unfeasible to provide an option to disconnect machine to machine (M2M) end-users, other than at the

¹² MTN submission para 3.2.2 Page 8

¹³ Ibid Para 3.2.4 Page 9

¹⁴ Vodacom submission para 35 Page 35-36

¹⁵ Vodacom submission para 36 Page 8

time of contracting, as there was no direct engagement with these users and M2M devices were programmed to ignore SMSs from Mobile Station International Subscriber Directory Number.¹⁶

3.6.1.6. Vodacom further stated that post-paid and hybrid end-users can buy additional voice and/or SMS services at any time (prior to and upon depletion of the allocation) and can elect to be disconnected when certain thresholds were reached using service specific account lock facility.¹⁷

3.6.1.7. Cell C was of the view that this provision would increase compliance and administrative costs without any concomitant benefit to the public.¹⁸ Cell C stated that this regulation did not make sense in the context of commercial transactions in the event that the end-user chooses the right package for their level of usage and their budget.¹⁹

3.6.1.8. Telkom supported this provision as it offered a unique spend limit functionality for management and control of out-of-bundle spend.²⁰

3.6.2. The Authority's Decision

The Authority is of the view that this provision is necessary to protect post-paid/hybrid users against the current practice of defaulting them to out-of-bundle charges upon depletion of their monthly allocation.

3.7. Insertion of regulation 83(1)(a)

3.7.1. Submissions Received

3.7.1.1. MTN indicated that this provision was not necessary as it sends usage notifications to end-users and cautioned the Authority against the prescription of depletion intervals. MTN was of the view that the proposed notifications are excessive and may result in poor customer

¹⁶ Ibid para 32 Page 7

¹⁷ Ibid para 30 Page 6-7

¹⁸ Cell C submission Para 59 Page 16

¹⁹ Ibid Para 59.1 Page 16

²⁰ Telkom submission Page 5

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experience.²¹ In addition, MTN stated it had included proactive notifications by notifying end-users when they have reached 50% and then 90% of their data bundles to assist end-users to manage and monitor their spend.²²

3.7.1.2. Vodacom submitted that the content of the notification and the "percentage depletion" notification ought not to be prescribed. Vodacom was of the view that end-users will not benefit from the proposed "percentage depletion" notification and that it will likely confuse rather than to assist end-users. Vodacom proposed a notification which records the bundle units remaining (i.e. data), which it was of the view that would enable end-users to manage and control their usage and to proactively plan for the purchase of additional bundles or units if they so require.

3.7.1.3. Vodacom suggested that a maximum of two notifications be sent to end-users before they reach the 90% threshold of usage for services as end-users will be given sufficient time to respond after such notifications.²³ However, Vodacom pointed out that a number of devices that use data services (e.g. M2M, dongles, routers, tablets, etc.) do not have the facility to view such notifications.²⁴

3.7.1.4. Cell C stated that it already provides notifications that bundles were becoming and have been depleted. Cell C stated that the proposed four increments of 50%, 75%, 90% and 100% were excessive and was of the view that it would irritate end-users, especially if the bundle was small.²⁵

3.7.1.5. Crystal Web Mobile and LEASP stated that the implementation of regulation 8B will require that fixed line Internet Service Providers inform customers through SMS of their data usage, with the transmission costs being borne by the ISP, operate as a USSD and not offer capped products.

²¹ MTN submission Para 4.4.4 Page 20

²² Ibid Para 3.3.4 Page 10

²³ Vodacom submission Para 11-19 Page 3-5

²⁴ Ibid Para 53 Page 12

²⁵ Cell C submission Para 58 Page 14

3.7.1.6. Telkom supported and recommended usage notifications based on the fixed absolute methodology. Currently, Telkom mobile subscribers are sent SMS notifications when they have 500MB, 100MB, 10MB and 0MB data bundles remaining on their data plans. Telkom stated that it will be difficult to follow the Authority's proposed amendment as it will have to make adjustments to each product bundle they offer, consequently being very costly.

3.7.2. The Authority's Decision

3.7.2.1. The Authority is of the view that the notifications are necessary to provide relevant timely information that will enable end-users to better monitor usage and limit spend to avoid or minimise bill shock as a result of high out-of-bundle charges.

3.7.2.2. The Authority, however, agrees with the licensees' view that percentage depletion usage notifications, rather than the relevant unit of measure, will more than likely confuse rather than assist end-users.

3.7.2.3. The Authority has therefore modified regulation 8B(1)(a) accordingly. Licensees must send end-users notification which include the amount of the bundle remaining (and the applicable out-of-bundle rate per MB).

3.7.2.4. The Authority has decided to reduce the usage notification percentage triggers to a minimum²⁴ of three notifications (i.e. 50%, 80% and 100% depletion) to minimise or avoid the risk of too many notifications, which could potentially confuse customers or result in customers ignoring them.

²⁴ Licensees can increase the number of alerts

3.8. Insertion of regulation 3B(1)(b)

3.8.1. Submissions Received

3.8.1.1. MTN was of the view that this regulation was not necessary as end-users can choose from a wide variety of additional bundles.²⁷

3.8.1.2. Vodacom stated that, contrary to the Industry practice, this regulation will preclude licensees from providing end-users with an option to buy additional bundles anytime prior to depletion of the allocated data²⁸ and therefore, resulting in negative impact on end-users²⁹.

3.8.1.3. Telkom agreed with this provision as it had sufficient measures in place for end-users to purchase additional data bundles.³⁰

3.8.2. The Authority's Decision

3.8.2.1. The Authority is of the view that this provision is necessary as it is meant to empower end-users to avoid bill shock as a result of high out-of-bundle rates.

3.8.2.2. The Authority agrees with Vodacom's submission to the extent that it amended the regulation to make it clear that the option to buy additional data bundle should be provided at any time (i.e. before and after depletion of a data bundle), to minimise service interruption.

²⁷ MTN submission Para 4.4.5 Page 20

²⁸ Vodacom submission Para 37 Page 8

²⁹ Ibid Para 10 Page 10

³⁰ Telkom submission Page 7

3.9. **Inclusion of regulation 83(1)(c)**

3.9.1. **Submissions Received**

3.9.1.1. MTN submitted that this provision amounted to interference with consumer choice with regards to product selection or infringe upon the right of end-users to choose their products and services; and was not authorised in terms of section 69 of the ECA. MTN further stated that this provision was an indirect attempt by the Authority to regulate the price of data services provided to end-users.³¹ In addition, MTN stated that this provision failed to take into account measures it had put in place to ensure that end-users were able to control and limit their spend on data service, if necessary.³²

3.9.1.2. MWEB was of the view that this provision was not necessary as end-users were provided information in line with the CPA about the rules relating to out-of-bundle charges. MWEB further stated that licensees already provide end-users with monitoring tools and as such there was no need to request the end-user to opt in or opt out of out-of-bundle usage.³³

3.9.1.3. Telkom submitted that it offered the option to not to default end-users to out-of-bundle charges as a standard on its data packages, with the exception of its FreeMe bundles which are aimed at providing subscribers with continuous connectivity.³⁴ Telkom was of the view that the option not to default end-users automatically to out-of-bundle charges could lead to poor customer experience and limit end-user choice and should not be enforced through Regulations.³⁵

3.9.2. Amandla.mobi submitted that out-of-bundle pricing was not transparent and was unfair to low income customers. Amandla.mobi further stated that automatic transition from in-bundle to out-of-

³¹ MTN submission Para 2.7.3;3.3.2 Page 8; 9

³² Ibid Para 3.3.3 Page 9-10

³³ MWEB submission Para 17 Page 4-5

³⁴ Telkom submission, Page 7

³⁵ Ibid Page 8

bundle pricing without a customer consent to opt-in to out of bundle usage, with out-of-bundle pricing of up to 50 times in-bundle pricing, was unfair and is exploitative to the poor.³⁶

- 3.9.3. Amandla.mobi recommended that the default position should not be out-of-bundle usage or licensees should not provide data service which may attract out-of-bundle charges.³⁷

3.9.4. The Authority's Decision

- 3.9.4.1. The Authority is of the view that the provision requiring that there not be defaulting end-user to out-of-bundle usage when their data bundles are depleted will not interfere with consumer choice.
- 3.9.4.2. The Authority is of the view that it is empowered to impose this provision as it relates to the manner in which end-users are billed or charged for out-of-bundle usage, which is consistent with section 69(5)(d)³⁸ and (f)³⁹ of the ECA.
- 3.9.4.3. The Authority would like to emphasise its view that the current practice of defaulting end-users to out-of-bundle charges is unfair and exposes end-users, particularly the poor, to the risk of bill shock as a result of high out-of-bundle charges.
- 3.9.4.4. While the Authority recognises voluntary measures⁴⁰ put in place by licensees to ensure that end-users control and limit their spend or minimise bill shock, the Authority is concerned that these usage limits and data depletion notifications are not provided in real-time⁴¹ to allow end-users to make an informed and timeous decision. In addition, the

³⁶ Amandla.mobi submission Para 2 Page 4

³⁷ Amandla.mobi submission Para 3 Page 4-5

³⁸ Section 69(5)(d) states that "The matters which an end-user and subscriber service charter may address include but are not limited to—...(d) end-user and subscriber charging, billing, collection and credit practices..." [our emphasis]

³⁹ Section 69(5)(f) states that "The matters which an end-user and subscriber service charter may address include but are not limited to—...(f) any other matter of concern to end-users and subscribers." [our emphasis]

⁴⁰ These measures includes usage limits for post-paid users and data depletion notifications via SMS, push USSD or USSD prompts when data usage reach certain thresholds.

⁴¹ MTN acknowledged that in some instances, data depletion notifications are received within 15 minutes of the data is depleted. Source: <https://mybroadband.co.za/news/cellular/234982-you-should-get-your-out-of-bundle-data-notification-straight-away.html>

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Authority is of the view that the usage depletion notifications are not effective as the notifications provided by licensees do not provide information on the applicable out-of-bundle rate.

3.10. **Insertion of regulation 8B(1)(d)**

3.10.1. **Submissions Received**

3.10.1.1. ISPA⁴³, WAPA⁴³ and Liquid Telecom⁴⁴ proposed that this provision should be amended to include out of bundle as follows: *"provided an option through SMS, push notification, USSD or any other applicable means to opt-in or opt-out of out of bundle usage per session."*

3.10.1.2. Liquid Telecom submitted that it was technically unfeasible to provide opt-in or opt-out per session using non-mobile data services/technologies. In addition, Liquid Telecom stated that consumers have a joint responsibility to monitor their usage and therefore, licensees should not be held solely liable for the irresponsible behaviours of some customers.⁴⁵

3.10.1.3. MTN was of the view that by the Authority prescribing the default position with regard to out-of-bundle charges will infringe upon the right of end-users to choose options that suit their needs.⁴⁶ MTN stated that it was unclear what was meant by "per session".⁴⁷

3.10.1.4. MWEB stated that this provision was impractical, unfeasible and will result in poor customer experience as the experience will not be seamless.⁴⁸

3.10.1.5. Vodacom indicated that it was not always technically feasible to obtain consent from end-users (for example corporate APN users) to charge them various options including out of bundle rates.⁴⁹ Vodacom also

⁴³ ISPA submission Para 9 Page 3

⁴⁴ WAPA submission Para 11 Page 2

⁴⁵ Liquid Telecom submission Para 15.3 Page 5

⁴⁶ Ibid Para 15.4-15.6 Page 5

⁴⁷ MTN submission Para 3.3.5 Page 10

⁴⁸ Ibid Para 3.3.6 Page 10

⁴⁹ MWEB submission Para 17 Page 4-5

⁴⁹ Vodacom submission Para 42 Page 9

Indicated that it is not technically feasible to provide an opt-out option for out of bundle usage on a per session or bundle basis but rather it can be done at a customer level.⁵⁰

3.10.1.6. Telkom stated that it supports this provision as it had sufficient measures to allow for opt-in or opt-out of out-of-bundle usage charges.

3.10.1.7. Cell C stated that the wording in this regulation which states that "*opt-in or opt-out of data bundle usage per session*" was vague and nonsensical, and that it contradicted regulation 2.⁵¹ In addition, Cell C indicated that it was not clear what "*usage per session*" means.⁵²

3.10.1.8. Amandia.mobi indicated that, each time a data bundle was about to be depleted, a licensee must send out an SMS offering an end-user the option to opt-in to out-of-bundle charges with information on the applicable out-of-bundle rate.⁵³ Furthermore, Amandia.mobi indicated that in the absence of a reply from an end-user to opt-in to out-of-bundle charges, data service should be discontinued or cut-off and airtime usage for data service should not be allowed when an end-user had reached the data allocation limit or had depleted (or finished) the data bundle.

3.10.2. The Authority's Decision

3.10.2.1. The Authority is of the view that this provision is necessary and will not undermine customers' choice contrary to the views of some licensees.

3.10.2.2. The Authority is also of the view that this provision will ensure that end-users are fully aware of the consequences of exceeding their allocation of data to minimise higher than expected bills for data services.

⁵⁰ Ibid Para 42.6 Page 10

⁵¹ Cell C submission Para 43-44 Page 11

⁵² Ibid Para 44.2 Page 11

⁵³ Amandia.mobi submission Para 3 Page 4-5

3.10.2.3. The Authority Included *out of bundle* as suggested by ISPA and Liquid Telecom.

3.11. Insertion of regulation SB(2)

3.11.1. Submissions Received

3.11.1.1. MTN Indicated that this provision was unnecessary, logically flawed and should be deleted as it had implemented measure to transparently communicate with end-users and to empower them to choose how to control their spend.⁶⁴

3.11.1.2. MTN⁶⁵ and Cell C⁶⁶ Indicated that this provision contradicts regulation SB(1)(d) to the extent that an end-user had opted out of out-of-bundle usage.

3.11.1.3. Telkom Indicated that this provision was automatically available on all data plans with the exception of FreeMe⁶⁷ plans. Telkom was of the view that this provision will limit customer choice and will stifle competition and innovation.

3.11.1.4. Liquid Telecom proposed that this provision be amended as follows:
 "end-user opts out of further data usage following data bundle depletion, a Licensee must not permit any out of bundle data usage by that end-user until such time as that end-user purchases a new data bundle or expressly consents to the charging of out bundle rates."⁶⁸

3.11.1.5. Vodacom Indicated that it was not practical for M2M users such as tracking companies, retailers, utility companies, etc. to opt-out of out of bundle usage as M2M devices are unmanned or not manned on a

⁶⁴ MTN submission Para 3.4 Page 11

⁶⁵ *Ibid* Para 3.4 Page 11

⁶⁶ Cell C submission Para 44 Page 11

⁶⁷ Subscribers on FreeMe plans are by default reverted to out-of-bundle usage rates. However, subscribers may change this option to be redirected to Telkom's out-of-bundle re-direct page. Additionally, post-paid subscribers can choose the amount by which they are prepared to spend on out-of-bundle usage rates once their bundles are depleted. Source: Telkom submission Page 9

⁶⁸ Liquid Telecom submission Para 15.3 Page 5

full-time basis.⁵⁹ Vodacom also indicated that M2M users prefer post-paid tariff plans which charge out-of-bundle rates by default due to low data usage of between 1Kb and 10MB per month.⁶⁰

3.11.1.6. Furthermore, Vodacom indicated that end-users who deplete their data bundle mid-session and do not opt-in for out-of-bundle charges will experience interrupted non-seamless data experience, which could result end-users paying to re-download the same content from the start.⁶¹

3.11.2. The Authority's Decision

3.11.2.1. After carefully considering submissions by licensees in this regard, the Authority is of the view that this provision should apply to prepaid and hybrid data users only. Unlike their post-paid counterparts⁶², prepaid and hybrid users face unique circumstances⁶³ and appropriate accommodations are necessary to assist them to minimise or avoid bill shock.

3.11.2.2. The Authority is satisfied with bill shock protection measures implemented for post-paid users. Therefore, this provision does not apply to post-paid users.

3.11.2.3. The Authority agrees with Liquid Telecom's submission and has amended the regulation accordingly.

3.11.2.4. The Authority is of the view that this provision will not limit end-users choice and lead to frustration and a poor experience. For example, Telkom has been offering this option to the majority of its subscribers and the Authority has not received complaints from

⁵⁹ Vodacom submission Para 48.2 Page 11

⁶⁰ Ibid Para 49 Page 11

⁶¹ Ibid Para 56 Page 12

⁶² Post-paid users can set a permanent monthly usage limit of greater than or equal to monthly subscription fee to control their out-of-bundle spend on data (and other services). Post-paid users can load additional data bundles on a temporary or permanent basis.

⁶³ Despite licensees implementing usage depletion notifications and advising end-users to buy data bundles to avoid being charged out-of-bundle rates, these notification are not necessarily adequate as they are not provided in real-time all the time resulting in end-users running into out-of-bundle charges and paying high out-of-bundle rates using their airtime.

Telkom subscribers. The Authority, however, received complaints from MTN, Vodacom and Cell C subscribers about bill shock owing to high out-of-bundle rates.⁶⁴ In this respect, the Authority found that MTN, Vodacom and Cell C's submission in this regard are misguided.

3.11.2.5. The Authority is of the view that the disconnection or reconnection option should not attract fees or charges as such fees would defeat the purpose of this regulation, which is meant to empower end-users to make an informed decision whether or not to pay high out-of-bundle charges.

3.12. Insertion of regulation 8B(3)

3.12.1. Submissions Received

3.12.1.1. ISPA⁶⁵ and WAPA⁶⁶ submitted that regulation 8B(3) can be read to mean that a licensee needs to merely provide an option of data bundles with a minimum validity period of 3 years along with its data bundles with a shorter expiry period. ISPA proposed that regulation 8B(3) should be amended to state that *"A licensee must ensure that all prepaid data bundles are provided with a minimum expiry period of*

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3.12.1.2. ISPA stated that the Authority should be mindful of section 64 of the CPA as many licensees invoice data bundles monthly in advance, which blurs the lines between post-paid and prepaid.⁶⁸ ISPA⁶⁹ and WAPA⁷⁰ further proposed that definitions of the terms pre-paid and post-paid be included in the final Regulations.

⁶⁴ MTN Group CEO, Mr. Rob Shuter, and Vodacom Group CEO, Mr. Shameel Jossob, have publicly acknowledged that out-of-bundle data prices are high. Source: <https://mybroadband.co.za/news/cellular/250045-vodacom-and-mtn-subscribers-pay-up-to-2800-more-for-out-of-bundle-data.html>

⁶⁵ ISPA submission Para 10 Page 3

⁶⁶ WAPA submission Para 12 Page 2

⁶⁷ *ibid* Para 10 Page 3

⁶⁸ ISPA submission Para 11 Page 3

⁶⁹ *ibid*

⁷⁰ WAPA submission Para 5 Page 2

3.12.1.3. Liquid Telecom recommended that the Authority conduct a full regulatory impact assessment study as it was of the view that this regulation will impose a significant overhead on licensees.⁷¹

3.12.1.4. MTN was of the view that the proposed validity period of 3 years was tantamount to fixing the terms of the provision of data services and will stifle competition to the detriment of end-users.⁷²

3.12.1.5. MTN stated that the proposed expiry period of three years will result in an increase in unearned revenue liability on MTN's balance sheet, which will impact MTN's key ratios. MTN stated that this impact will be exacerbated by the current growth in data consumption.⁷³ MTN submitted that a regulatory impact assessment study was required to fully understand the impact of the proposed amendment.⁷⁴

3.12.1.6. MTN indicated that the Authority incorrectly equated the purchase of a prepaid data bundle with the purchase of a prepaid voucher as envisaged in section 63(2) and (3) of the CPA.⁷⁵ MTN is of the view that section 63 ceases to apply to prepaid data bundles as section 63 required that an end-user be given a period of three (3) years within which to redeem a voucher and not a period of three (3) years to use the services (i.e. data bundles) that were made available pursuant to the purchase of a voucher.⁷⁶

3.12.1.7. MTN further stated that the Authority does not have the power to make pronouncements on the correct interpretation of the provisions in the CPA, particularly with respect to section 63, without any consideration of the views of the National Consumer Commission ("NCC"). MTN indicated that the NCC had not taken issue with MTN's application and interpretation of section 63.⁷⁷

⁷¹ Liquid Telecom submission Para 15.9 Page 6

⁷² MTN submission Para 3.5.2 Page 11

⁷³ Ibid Para 3.5.3.2-3.5.3.5 Page 12-13

⁷⁴ MTN supplementary submission dated 9 March 2018

⁷⁵ Ibid Para 3.5.4-3.5.11 Page 13-16

⁷⁶ Ibid Para 3.5.12 Page 17

⁷⁷ Ibid Para 3.5.13 Page 17-18

3.12.1.8. MTN indicated that the proposed validity period of three (3) years will counteract section 68 of the ECA, which enjoins the Authority to ensure efficient use and allocation of scarce numbering resource.⁷⁸

3.12.1.9. MWEB submitted that section 63 of the CPA does not apply to prepaid data as prepaid data was not the same as a prepaid certificate, credit or voucher. Furthermore, MWEB stated that the proposed validity period of three (3) years will make it impossible for licensees to project the expected usage on their network in order to manage it.⁷⁹

3.12.1.10. The Free Market Foundation ("FMFSA") submitted that this provision was ambiguous as it was not clear if licensees will be required to offer data bundles with minimum validity period of three (3) years in addition to the current data bundle offerings.⁸⁰ Furthermore, FMFSA stated that this provision was *ultra vires* as it falls outside of matters contemplated in section 69(5) of the ECA.⁸¹

3.12.1.11. FMFSA disagreed with the Authority's interpretation of section 69(5)(f) of the ECA. FMFSA is of the view that "any other matter of concern to end-users and subscribers" means "customer service" matters of concern to end-user and it did not bear a wider meaning as proposed by the Authority in the second draft EUSC Regulations.⁸²

3.12.1.12. Vodacom submitted that the Authority did not have power to impose interventions in the ECA based on the Authority's interpretation of the CPA.⁸³

3.12.1.13. Vodacom was of the view that the interpretation and application of the CPA did not lie within the remit of the Authority but that of the NCC.⁸⁴ Vodacom was also of the view that the Authority can refer the matters of non-compliance with section 63 to the NCC who can refer the matter to the National Consumer Tribunal.⁸⁵

⁷⁸ MTN submission Para 3.6.14 Page 18

⁷⁹ MWEB submission Para 18 Page 6

⁸⁰ FMFSA submission Page 3

⁸¹ Ibid Page 5-6

⁸² Ibid Page 6

⁸³ Vodacom submission Para 60 Page 16; Para 73 Page 16

⁸⁴ Vodacom supplementary submission Para 4 Page 2

⁸⁵ Vodacom submission Para 74 Page 16

3.12.1.14. Notwithstanding the above, Vodacom indicated that the correct interpretation of section 63(2) of the CPA required a clear understanding of section 63(1). Vodacom stated that it was important to identify the device, what was sold by Vodacom, what was bought by an end-user and the point in time at which redemption occurs and what was made available to the consumer on redemption.⁸⁶

3.12.1.15. Vodacom stated that the Authority was not empowered by legislation to prescribe validity periods for data expiry, which will directly affect and regulate the price of data services⁸⁷. Furthermore, Vodacom stated that regulation of prices did not fall within minimum standards as contemplated in section 69 of the Electronic Communications Act and also violated section 2(f)⁸⁸ and (y)⁸⁹ of the ECA

3.12.1.16. Vodacom was of the view that the prepaid vouchers sold by it comply with section 63 of the CPA as they are valid for thirty-eight (38) months from the date of issue.⁹⁰

3.12.1.17. Vodacom stated that the proposed validity period of three (3) years will limit customer choices that are available in the market and the benefit of buying data bundles with different sizes at different price points.⁹¹ Vodacom also stated that the unintended consequences of prescribing the minimum validity period of three years will be the termination of non-qualifying and lower priced offers resulting in customers paying more for data services.⁹²

3.12.1.18. Vodacom further stated that the proposed validity period of three (3) years will dilute competition⁹³ to the detriment of end-users and also

⁸⁶ Vodacom supplementary submission Para 12 Page 4

⁸⁷ Vodacom submission para 7-8 Page 3

⁸⁸ Section 2(f) enjoins the Authority to "promote competition within the ICT sector"

⁸⁹ Section 2(y) enjoins the Authority to "refrain from undue interference in the commercial activities of licensees while taking into account the electronic communications needs of the public"

⁹⁰ Vodacom supplementary submission Para 12 Page 4

⁹¹ Ibid Para 86 Page 15. Also its presentation during the public hearings held on 1 March 2018, Vodacom indicated that 82% of its subscriber base use data bundles with validity period of less than 30 days, with data bundles with shorted validity period being the most popular. For example, 1GB data bundle cost between R28 and R148 depending on the validity period.

⁹² Vodacom presentation dated 1 March 2018 Slide No. 7

⁹³ Operators will offer data bundles with the same validity period

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reduce the ability of licensees to efficiently manage network use and investment.⁹⁴

3.12.1.19. Crystal Web Mobile and LEASP stated that the Authority's interpretation of section 63 of the CPA was incorrect. Crystal Web Mobile and LEASP were of the view that section 63 applied to prepaid voucher or prepaid credit balance.⁹⁵

3.12.1.20. Cell C submitted that regulation 8B(3) was not in line with the minimum standard for the quality of the products or transparent provision of information to consumers in terms of section 69(3) and (5) of the ECA.⁹⁶

3.12.1.21. Cell C indicated that the proposed three (3) year expiry period for data bundles will significantly increase costs for consumers contrary to sections 2(m)⁹⁷ and (n)⁹⁸ of the ECA.⁹⁶

3.12.1.22. Cell C indicated that the proposed three (3) year validity period will make provisioning¹⁰⁰ of capacity on its network close to impossible and resulting in increased unpredictable costs. Cell C also indicated that the proposed maximum validity period will increase its current liabilities in the form of unearned revenue, which will impact on its ability to obtain financing at a reasonable cost. Other costs expected to increase are related to information technology licenses required to maintain a subscriber on the Home Location Register, maintenance cost of data allocated over three (3) years, roaming costs, etc. Cell C indicated that these additional costs will be passed onto customers.¹⁰¹

⁹⁴ Vodacom presentation dated 1 March 2018 Slide No. 7

⁹⁵ Crystal Web Mobile and LEASP submission Para 8-9 Page 3

⁹⁶ Cell C submission Para 14-15 Page 4

⁹⁷ Section 2(m) enjoins the Authority to "ensure the provision of a variety of quality electronic communications services at reasonable prices"

⁹⁸ Section 2(n) enjoins the Authority to "promote the interests of consumers with regard to price, quality and the variety of electronic communications services"

⁹⁹ Ibid Para 18-19 Page 5

¹⁰⁰ Cell C stated that provisioning is the assessment of capacity needs to make available for network usage in a given month in order to know how much capacity to lease from its service providers

¹⁰¹ Ibid Par 21-26 Page 5-7

3.12.1.23. Cell C stated that numbering capacity will be affected as licensees will not be able to recycle numbers if there was no activity within three (3) years.¹⁰²

3.12.1.24. Telkom stated that it offered a variety of validity periods, ranging between thirty – one (31) days and twelve (12) months. Telkom stated that extending the current data validity periods to three (3) years will have a negative impact on current data pricing and differentiation.¹⁰³

3.12.1.25. Telkom was of the view that small licensees like Telkom Mobile will be restricted in their ability to provide innovative products and pricing which differentiates it from larger operators, should this provision be promulgated in its current form.

3.12.1.26. Telkom indicated that the proposed three (3) year minimum validity period will disrupt its business model as its network was configured to support its current data plans and expiry data business rules.

3.12.1.27. Telkom raised a concern about the negative impact of extending the minimum validity period to three (3) years on numbering resources as it will be required to keep numbers active for three (3) years even if they were not used.

3.12.1.28. Amandla.mobi stated that the proposed regulation will stifle competition introduced by Cell C and Telkom Mobile to the detriment of consumers.¹⁰⁴

¹⁰² Ibid Para 29 Page 7

¹⁰³ Telkom submission Page 9-11

¹⁰⁴ Amandla.mobi submission Para 1 Page 4

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3.12.1.29. Amandia.mobi was of the view that users who buy small data bundles which were depleted in less than 30 days will be disadvantaged as they were likely to pay more than what they currently pay.¹⁰⁵

3.12.1.30. Amandia.mobi recommended that the expiry period should be reduced to between ninety (90) to one hundred and twenty (120) days.¹⁰⁶

3.12.2. The Authority's Decision

3.12.2.1. The Authority deleted regulation 8B(3) of the draft second EUSSC Regulations in the final Regulations after careful consideration of submissions by interested parties. However, the Authority is of the view that the NCC, as the custodian of the CPA, should take the necessary steps to enforce compliance with section 63 of the CPA.

3.12.2.2. The Authority will provide assistance to the NCC on this matter, if necessary, in line with the Memorandum of Understanding between the Authority and NCC.

3.12.2.3. However, after consideration of submissions on the first draft EUSSC Regulations and the second draft EUSSC Regulations, the Authority has included the provision for roll over of unused data for all users before expiry. The Authority is of the view that the business rules (including terms and conditions of the roll over) relating to the roll over of unused data should be determined by licensees. In addition, the Authority is of the view that rolled over data should be depleted first before the depletion of new allocated data bundles to ensure that end-users derive maximum benefit from the rolled over data.

¹⁰⁵ Ibid Para 1 Page 4

¹⁰⁶ Ibid Para 3 Page 4

3.12.2.4. Without being overly prescriptive in respect of the expiry period of rolled over data, the Authority would like to encourage Licensees not to expire rolled over data before the expiry date of new allocated data bundle.

3.12.2.5. The Authority is of the view that this provision will benefit end-users by minimising the risk of premature expiry of data bundles. The Authority is also of the view that this provision will not impact negatively on licensees as some licensees are offering this option to their subscribers.

3.13. Insertion of regulation 8B(4)

3.13.1. Submissions Received

3.13.1.1. ISPA stated that regulation 8B(4) overlooked the difference between Electronic Communications Network Services and Electronic Communications Services as data bundles are allocated to the end user by the ECS licensee who provides access to the network by an ECNS. ISPA stated that end-users using the same ECS provider do not necessarily have the same ECNS provider.¹⁰⁷

3.13.1.2. ISPA further stated that the ability to transfer rolled over data between users on the same ECS who in turn use the same ECNS required software development which would require considerable amount of time. ISPA also stated that with regard to ECS providers using different ECNS service providers, data transfer will not be technically feasible.

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3.13.1.3. ISPA stated that this regulation should be deleted and replaced with a regulation governing the practice with regard to depletion of rolled-over unused data. ISPA recommended that regulation 8B4 be replaced and amended as follows:

¹⁰⁷ ISPA submission Para 12 Page 4

¹⁰⁸ Ibid Para 13 Page 4

"Where data has been rolled over for post-paid users, a Licensee must account for the data in such a manner that the oldest allocation of data is depleted before more recent allocations of data." ¹⁰⁹

3.13.1.4. Liquid Telecom supported this provision. Liquid Telecom was however of the opinion that this provision was only technically feasible for licensees with integrated ECNS and ECS operations.¹¹⁰

3.13.1.5. Liquid Telecom was of the view that the proposed transfer of data would require complex and time consuming development and also could result in end-users transferring data into unlicensed operators or a reseller without reseller exemption and could be used for the purposes of money laundering.¹¹¹

3.13.1.6. MTN stated that the proposed option to roll over unused data was overly prescriptive.¹¹²

3.13.1.7. MTN stated that it was providing an option to transfer data to its customers. However, MTN cautioned the Authority that this provision is overly prescriptive and amounts to an attempt by the Authority to prescribe contractual terms governing the provision of data services to end-users. MTN stated that this was further not in line with section 69(5) of the ECA.

3.13.1.8. MTN submitted that regulation 8B(4) should be deleted in its entirety.

3.13.1.9. MWEB supported the proposed option with regard to roll over of unused data.¹¹³

3.13.1.10. MWEB was of the view that the proposed option to transfer data to other users would create an administrative burden on licensees which could result in increases in the price of data services.¹¹⁴

¹⁰⁹ ISPA submission Para 14-15 Page 4

¹¹⁰ Liquid Telecom Para 12.11-15.12 Page 8

¹¹¹ Liquid Telecom Para 15.3-15.4 Page 6-7

¹¹² MTN submission Para 3.8.1 Page 19

¹¹³ MWEB submission Para 19 Page 5

¹¹⁴ *ibid*

- 3.13.1.11. FMFSA stated that this provision requires licensees to offer a choice to end-users on unrelated issues. In addition, FMFSA stated that this provision is prescriptive and intrudes in the commercial activities of licensees, which is *ultra vires*.¹¹⁵
- 3.13.1.12. Vodacom stated that this provision is ultra vires the powers conferred to the Authority in terms of section 69 of the ECA.¹¹⁶ Vodacom was of the view that the motivation¹¹⁷ for this provision did not justify regulation of roll over or transfer of data.
- 3.13.1.13. WAPA was of the view that this provision will result in increased data prices as licensees would be required to develop systems to comply with it especially where end-users are connected to the same ECS service provider who was provided access by different ENCS service provider.¹¹⁸
- 3.13.1.14. The NCC submitted that this provision contradicted section 14 and regulation 15 of the CPA as it permits the forfeiture of rolled over data that remained beyond the next billing period.
- 3.13.1.15. Cell C stated that it allows its post-paid users to roll over data for one calendar month and transfer of data among its subscribers¹¹⁹. However, Cell C was of the view that this provision will make it difficult for licensees to estimate network capacity and this may result in overprovision of capacity on its network.¹²⁰
- 3.13.1.16. Telkom stated that the transfer of data between different data bundles was complex and implementing this proposed option will result in increased costs which will be passed onto consumers in the form of increase in data prices.¹²¹

¹¹⁵ Free Market Foundation submission Page 6-8

¹¹⁶ Vodacom submission Para 78-79 Page 17

¹¹⁷ Second draft EUSSC Regulations Page 28

¹¹⁸ WAPA submission Para 13 Page 2-3

¹¹⁹ Cell C submission Para 48 Page 12

¹²⁰ Ibid Para 49 Page 12

¹²¹ Telkom submission Page 13

3.13.2. The Authority's Decision

After consideration of submissions on the second draft EUSC Regulations, the Authority has amended the provision for transfer of data to allow all end-users to transfer data to other users on the same network. Similar to rollover of unused data provision, the Authority is of the considered view that transfer of data provision will benefit end-users as they will be able to manage the risk of expiry of unused data. The Authority is also of the view that this provision will not impact negatively on licensees as some licensees are offering this option to their subscribers.

3.14. Insertion of regulation 8(C)(1)

3.14.1. Submissions Received

3.14.1.1. ISPA was of the view that this provision was applicable to mobile operators. ISPA recommended that the Regulations be explicit in this regard.¹²²

3.14.1.2. MWEB was of the view that educational awareness campaigns should be conducted by the Authority, not licensees, to ensure consistency and that the correct message is conveyed to end-users.¹²³

3.14.1.3. WAPA recommended the deletion of this provision or amendment to indicate which category of licensees will be required to conduct the proposed campaigns.¹²⁴

3.14.1.4. Telkom supported this provision and was of the view that it complies with the proposed regulation.¹²⁵

¹²² ISPA submission Para 17 Page 5

¹²³ MWEB submission Para. 20 Page 5

¹²⁴ WAPA submission 15 Page 3

¹²⁵ Telkom submission Page 13-15

3.14.2. The Authority's Decision

The Authority is of the view that educational awareness campaigns are necessary particularly given the growth in data penetration and smartphone penetration. The Authority is also of the view that this provision will assist end-users to, among others, to better monitor and manage the use of their devices and avoid unexpected data charges.

3.15. Insertion of regulation 8(C)2**3.15.1. Submission Received**

3.15.1.1. Telkom was of the view that the Authority should not prescribe the number of awareness campaigns that should be carried out by operators.

3.15.2. The Authority's Decision

The Authority is of the view that a minimum of four campaign will not be burdensome on licensees.

3.16. Amendment to regulation 13

3.16.1. No submissions received.

3.17. Short Title and Commencement**3.17.1. Submission Received**

3.17.1.1. WAPA recommended that the Authority defer the Implementation of the Regulations to after the publication thereof to ensure that licensees understand how to comply with the Regulations.

3.17.2. The Authority's Decision

The Authority agreed with WAPA and has amended this regulation accordingly.

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4 May 2018

Councillor B Mokhele
ICASA
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164 Katherine Street
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Per Email: chairperson@icasa.org.za
BMokhele@icasa.org.za

Dear Madam

Re: Unpublished final amended End-user and Subscriber Service charter regulations

1. The Authority's media statement, 26 April 2018 media briefing and unpublished final End-user and Subscriber Service Charter amendment regulations ("proposed amended regulations") refers.
2. Cell C has perused the unsigned proposed amendments regulations available on the Authority's website and we note that these proposed amended regulations are as yet unpublished in the Government Gazette. The proposed amended regulations make provision that they "will come into force one(1) month after publication in the Gazette".
3. In anticipation of the publishing of the proposed amended regulations in the Government Gazette, Cell C has proactively undertaken a technical assessment and business analysis with our internal technical and commercial teams, as well as with our external vendors and partners who manage and maintain Cell C's IN platforms (billing and technical) for the provision of retail and wholesale electronic communication services and network services. The technical analysis of the impact of these proposed amended regulations includes the changes required across Cell C network and wholesale partner networks as a consequence of the coming into effect of the proposed amended regulations.
4. As you will appreciate the proposed amended regulations affect Cell C's current product offerings and will require changes to our highly complex IN platforms. Our preliminary analysis indicates that this will require major changes and further development to our IN platforms including software (source code) upgrades, business rules changes and product offering changes. These developments have to be scoped, tested (with identified problems resolved) and finally integrated into the provision environment without compromising existing technical platforms and existing service provision.



5. In addition to the above complexities, Cell C retail and wholesale environments are unique as compared to other licensees where Cell C offers wholesale services to Mobile Virtual Network Operators (MVNO's). These MVNO's are hosted on internal Cell C technical platforms and external standalone technical platforms that require changes and upgrades as a consequence of the proposed amended regulations. As you will appreciate that these changes does not only affect Cell C retail environment but also Cell C's wholesale partners where extensive interventions, project scoping, planning and time are required on their platforms as well. It must be noted that our wholesale partners also rely on their vendors for the development of these changes. Our wholesale partners upon conclusion of such exercise we will be in a much better position to understand the full extent of the changes required.
6. We are therefore informing you, that it is highly unlikely, for the reasons stated above, that Cell C or our wholesale business partners will be able to implement these changes within one (1) month. This is not due to any lack of effort or willingness on Cell C's part but a reality necessitated by the complex technical requirements to comply with the implementation of the proposed amended regulations. However where possible, if any particular provisions of the proposed amended regulations can be implemented within this one (1) period, then Cell C will do so.
7. After the publication of the final amended regulations in the Government Gazette, Cell C will have certainty of the prescribed requirements and be in a better position to understand the full extent of the changes required to its systems and business processes and the timeframe to implement these changes and we will communicate with the Authority in this regard.

We trust that the above is in order.

Yours sincerely

Thembu Phiri
Executive Head: Regulatory

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GENERAL NOTICES • ALGEMENE KENNISGEWINGS

**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
NOTICE 233 OF 2018****END-USER AND SUBSCRIBER SERVICE CHARTER AMENDMENT
REGULATIONS IN TERMS OF SECTION 4 READ WITH SECTION 69(3) OF
THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005, AS AMENDED**

I, Rubben Mohlaloga, Chairperson of the Independent Communications Authority of South Africa ("the Authority"), hereby publish the End-user and Subscriber Service Charter Amendment Regulations, 2018.

Rubben Mohlaloga
Chairperson

SCHEDULE

1. Definitions

In these Regulations "the Regulations" means the End-User and Subscriber Service Charter Amendment Regulations as published under Government Notice No. 39898 of 1 April 2016.

2. Amendment of regulation 1 of the Regulations

2.1 Regulation 1 of the Regulations is hereby amended-

- (a) by the insertion after the definition of "Alternative Dispute Resolution" of the following definition: "**Authority**" means the Independent Communications Authority of South Africa established by section 3 of the ICASA Act 13 of 2000;"
- (b) by the insertion after the definition of "Complainant" of the following definition: "**Data bundle**" means a set amount of data for a set price;"
- (c) by the insertion after the definition of "Fixed Service" of the following definition: "**Hybrid plans**" means a service in terms of which an end-user pays monthly subscription that includes allocation of voice minutes, SMS and data services and allows an end-user to purchase additional voice minutes, SMS and data services."
- (d) by the insertion after the definition of "Mobile Services" of the following definition: "**Out-of-bundle**" means a rate that an end-user is charged upon depletion of the allocated bundle;"

- (e) by the Insertion after the definition of "Point of Sale" of the following definition: **"Post-paid plans"** means a service in which an end-user pays monthly subscription and usage charges at the end of each month for the allocation of voice minutes, SMS and data services;" and
- (f) by the Insertion after the definition of "Speech Quality" the following definition: **"Unstructured Supplementary Service Data (or USSD)"** means a Global System for Mobile communication technology that is used to send text between a mobile phone and an application program in the network;"

2.2 Regulation 1 of the Regulations is hereby amended by the deletion of the definitions "Quality of Service Measurements", "Service Activation" and "Service Activation Time".

3. Amendment of regulation 4 of the Regulations

3.1 Regulation 4 of the Regulations is hereby amended by the substitution for sub-regulation (2) of the following sub-regulation:

"(2) A licensee must conduct random checks on points of sale and service outlets to monitor compliance with the requirement to provide information to end-users as contained in sub-regulation (1)."

3.2 Regulation 4 of the Regulations is hereby amended by the addition of the following sub-regulation (4):

"(4) Reports in terms of sub-regulation (3) must be submitted to the Authority in February and in August of every year."

4. Amendment of regulation 5 of the Regulations

Regulation 5 of the Regulations is hereby amended by the addition of the following sub-regulation (4):

"(4) Reports in terms of sub-regulation (3) must be submitted to the Authority in February and in August of every year."

5. Amendment of regulation 8 of the Regulations

Regulation 8 of the Regulations is hereby amended by the deletion of sub-regulation (7).

6. Insertion of regulations 8A, 8B and 8C respectively in the Regulations

The following regulations are hereby inserted in the Regulations, after regulation 8:

"8A. VOICE AND SMS SERVICES

- (1) A licensee must send usage depletion notifications via SMS, push notification or any applicable means to end-users when their usage reaches 50%, 80% and 100% depletion.
- (2) A licensee must provide end-users who are on post-paid plans with an option to buy additional voice services or SMS services at any time.
- (3) Where an end-user who is on a post-paid or hybrid tariff plan and whose voice and SMS services are depleted does not buy additional voice services or SMS services, a licensee must provide such end-user with an option not to access the relevant depleted services and allow such end-user access to emergency services, customer care services, and incoming voice calls, incoming SMSs and any other free services.

8B. DATA SERVICES**Out of bundle billing practices:**

- (1) A Licensee must ensure that an end-user is:
 - (a) sent data usage depletion notifications via SMS, push notification or any other applicable means when usage reaches 50%, 80% and 100% depletion of data bundles;
 - (b) provided with an option to buy additional data bundles via the USSD platform, push notification, or any other applicable means at any time;
 - (c) not defaulted onto out-of-bundle data charges upon depletion of data bundles; and
 - (d) provided an option via SMS, push notification, USSD or any other applicable means at any time to opt-in to out-of-bundle usage charge.
- (2) Where an end-user does not opt-in to out-of-bundle data charge as per regulation 8B(1)(d) above, a Licensee must not permit any out-of-bundle data usage by an end-user until such time that an end-user purchases new data bundles or consents to be charged out-of-bundle data rates via USSD, SMS, push notification or any other applicable means.

Roll over of unused data and transfer of data

- (3) A Licensee must provide end-users with an option to roll over unused data before expiry date. In the event of unused data being rolled over, a Licensee shall in the first instance apply data usage against the rolled over data until that data is fully depleted, and thereafter against the newly allocated data.

- (4) A Licensee must provide end-users with an option to transfer data to other end-users on the same network.

8C. CONSUMER EDUCATION AND AWARENESS

- (1) A Licensee must conduct educational awareness campaigns aimed at:
- (a) educating end-users on the use of smart phones;
 - (b) educating end-users on how to use data; and
 - (c) educating end-users on a broad range of products and services offered.
- (2) A Licensee must conduct at least four (4) educational awareness campaigns per annum."

7. Amendment of regulation 13 of the Regulations

Regulation 13 of the Regulations is hereby amended by the substitution for sub-regulation (1) of the following sub-regulation:

- "(1) A complaint may be referred to the Authority's alternative dispute resolution should a licensee not be able to resolve the complaint in terms of regulation 12."

8. Short Title and Commencement

These Regulations are called the End-User and Subscriber Service Charter Amendment Regulations 2018 and will come into force one (1) month after publication in the Gazette.



Independent Communications Authority of South Africa
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REASONS DOCUMENT FOR THE END-USER AND SUBSCRIBER SERVICES CHARTER AMENDMENT REGULATIONS, 2018

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1. Introduction

- 1.1. On 7 August 2017, the Independent Communications Authority of South Africa ("Authority") published a notice of its intention to amend the End-User and Subscriber Service Charter Regulations of 2016 (*Government Gazette* 39898), under General Notice No. 822 in the *Government Gazette* 41030 ("the first draft EUSSC Regulations") and invited public comments to be made within a period of thirty (30) working days¹.
- 1.2. This amendment was necessitated by general concerns raised by various stakeholders, including consumer groups and social media campaigns, with regards to data expiry rules, high out-of-bundle rates and rules and also out-of-bundle voice and Short Messaging Service ("SMS") rules currently applied by licensees.
- 1.3. The aforementioned concerns range from consumer complaints about the unfairness arising from the expiry of data bundles or the forfeiture of unused data if not used within a particular period prescribed by the licensee to pronouncements by parliament and other authorities to the effect that these industry rules and/or practices prejudice consumers and are perceived to be contrary to the provisions of section 63 of the Consumer Protection Act No 68 of 2008 ("CPA"). In addition, consumers have raised concerns about 'open line' of post-paid, hybrid and prepaid tariff plans being susceptible to being charged high out-of bundle rates when once-off or recurring bundles are depleted.
- 1.4. To address the above mentioned concerns, the first draft of the EUSSC Regulations proposed, among others, the following provisions to empower end-users:
 - 1.4.1. Notifications of voice, SMS depletion to be sent to the end-users at set intervals and also provision for end-users on post-paid / hybrid plans to purchase additional services upon such depletion or be disconnected if end-users do not buy additional bundles.

¹ The due date for submission of written representations was 19 September 2017.



- 1.4.2. End-users to be given an option to opt-in or out of out-of-bundle charges to minimise bill shock.
 - 1.4.3. The expiry of data bundles is to be linked to the bundle size, with the shortest being ten (10) days for bundles between 1 Megabyte and 50 Megabytes, and the longest being twenty-four (24) months for 20GB and above.
 - 1.4.4. Allowance for the roll-over of unused data when an end-user recharges prior to the expiry date.
 - 1.4.5. Licensees to conduct quarterly consumer education and awareness to educate end-users on the use of smart phones, use of data and provision of information on the broad range of products and services offered.
- 1.5. The Authority received written representations² on the first draft EUSSC Regulations from:-
- 1.5.1. Cell C ;
 - 1.5.2. Telkom;
 - 1.5.3. MWEB;
 - 1.5.4. MTN;
 - 1.5.5. Vodacom;
 - 1.5.6. South African Communications Forum;
 - 1.5.7. Joris Stork;
 - 1.5.8. Nonkululeko Abavana;
 - 1.5.9. KE Mokone;
 - 1.5.10. Liquid Telecom (formerly known as Neotel);
 - 1.5.11. Ivan Roux;
 - 1.5.12. Nhlakanipho Zuma;
 - 1.5.13. JP du Plessis;
 - 1.5.14. Mr M.P. Yates;
 - 1.5.15. PA du Plessis;

² The National Consumer Commission made a presentation on the amendment to the first EUSSC Regulations to the End-user and Subscriber Charter Council Committee on 14 September 2017. However, the National Consumer Commission did make a written representation on the Regulations.

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- 1.5.16. Izak Nothling;
 - 1.5.17. Johan Kriel;
 - 1.5.18. Ofentse Maloba;
 - 1.5.19. Jo-Anne Stolp; and
 - 1.5.20. SANCU.
- 1.6. After taking into account written submission on the first draft EUSSC Regulations, the Authority published the second draft End-User and Subscriber Service Charter Regulations under General Notice No. 629 in the *Government Gazette* 41263 of 17 November 2017 ("the second draft EUSSC Regulations") for further public comments for a period of thirty (30) working days.³
- 1.7. The second draft EUSSC Regulations proposed new provisions in respect of the minimum validity period of three (3) years for prepaid data bundles and the roll-over and transfer of unused post-paid data.
- 1.8. The Authority received representations⁴ on the second draft EUSSC Regulations:-
- 1.8.1. Amandla.mobi;
 - 1.8.2. Cell C;
 - 1.8.3. Crystal Web Mobile & LEASP;
 - 1.8.4. Free Market Foundation;
 - 1.8.5. ISPA;
 - 1.8.6. Liquid Telecom;
 - 1.8.7. Mark Lister;
 - 1.8.8. MTN;
 - 1.8.9. MWEB;
 - 1.8.10. National Consumer Commission;
 - 1.8.11. Telkom;
 - 1.8.12. Vodacom; and
 - 1.8.13. WAPA.

³ The due date for submission of written representations was 3 January 2018.

⁴ <https://www.icasa.org.za/pages/end-user-and-subscriber-service-charter-regulations>

- 1.9. The Authority published a media release on its website⁵ on 26 February 2018 with respect to the public hearings to be held on the second draft EUSC Regulations which were held on 01 and 02 March 2018.
- 1.10. The Authority published a schedule of the aforementioned public hearings on the second draft End-user Regulations on its website⁶ on 26 February 2018.
- 1.11. All Interested parties, except Mark Lister and MWEB⁷, who submitted written representations on the second draft EUSC Regulations participated in the public hearings.
- 1.12. After the public hearings the Authority received supplementary written representations on the second draft EUSC Regulations from the following stakeholders:-
- 1.12.1. Cell C;
 - 1.12.2. Vodacom;
 - 1.12.3. ISPA;
 - 1.12.4. Crystal Web;
 - 1.12.5. MTN;
 - 1.12.6. Amandla.mobi; and
 - 1.12.7. Telkom.

⁵ <https://www.icasa.org.za/news/2018/icasa-to-hold-public-hearings-in-respect-of-the-second-draft-of-the-end-user-and-subscriber-service-charter-regulations>

⁶ <https://www.icasa.org.za/news/2018/schedule-for-public-hearings-on-the-draft-end-user-and-subscriber-service-charter-regulations>

⁷ Both Mark Lister and MWEB confirmed via email their unavailability to participate in the public hearings.

2. Legislative Framework

2.1. The amendment of the End-User and Subscriber Service Charter Regulations of 2016 was made in terms of section 4 read with section 69(3) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) ("ECA").

2.2. Section 4(1) of the ECA stipulates as follows:

"The Authority may make regulations with regard to any matter which in terms of this Act or the related legislation must or may be prescribed, governed or determined by regulation." (our emphasis)

2.3. Section 69(3) of the ECA stipulates as follows:

"The Authority must, as soon as reasonably possible after the coming into force of this Act, prescribe regulations setting out the minimum standards for end-user and subscriber service charters."

2.4. Furthermore, section 69(5) of the ECA stipulates that:

"The matters which an end-user and subscriber service charter may address include, but are not limited to—

- (a) the provision of information to end-users and subscribers regarding services, rates, and performance procedures;*
- (b) provisioning and fault repair services;*
- (c) the protection of private end-user and subscriber information;*
- (d) end-user and subscriber charging, billing, collection and credit practices;*
- (e) complaint procedures and the remedies that are available to address the matters at issue; and*
- (f) any other matter of concern to end-users and subscribers."*

3. Submissions received on the second draft EUSC Regulations and the Authority's response

3.1. Amendment to regulation 1

3.1.1. Submission Received

3.1.1.1. Liquid Telecom queried the reasons for the deletion of definitions "Service activation" and "Service Activation Time" and stated that it believes that the definitions provide guidance for stakeholders in complying with regulation 9(5) of the second draft EUSC Regulations.

3.1.1.2. Liquid Telecom indicated that references to "post-paid plans" and "hybrid plans" were not defined and may therefore be subject to interpretation.⁸

3.1.1.3. Vodacom stated that there were additional items that required definitions such as "out-of-bundle", "allocated data", "session" and "disconnection".

3.1.1.4. WAPA suggested that the Authority include the definitions for "prepaid" and "post-paid" so licensees can be clear on which subscribers fit into which category.

3.1.1.5. Cell C did not agree with the definition of "data bundle" and suggested that the definition refers to "bytes" and "connectivity for purposes of the Internet."

3.1.2. The Authority's Decision

3.1.2.1. The Authority is of the view that the definitions for "Service activation" and "Service Activation Time" should not be included in the Regulations as these terms were not used in the body of the Regulations.

⁸ Liquid Telecom submission Para 14.4 Page 5

3.1.2.2. The Authority included a definition for "post-paid plan" as suggested by WAPA as well as a definition for "hybrid plan" as suggested by Liquid Telecom.

3.1.2.3. The definition of "prepaid" was not included in the Regulations as it was not used in the body of the final Regulations.

3.2. **Amendment to regulation 5**

3.2.1. Submission Received

MWEB stated that it believed that fair usage policies should only be included in promotional material insofar as the policy of the promotion differs from the usual policy.

3.2.2. The Authority's Decision

The Authority is of the view that the inclusion of fair usage policies in respect of promotions will empower end-users to make informed decisions, and as such are to be included at all times.

3.3. **Amendment to regulation 8**

3.3.1. Submissions Received

3.3.1.1. ISPA recommended that regulation 8 be amended due to the deletion of sub-regulation 7(a).

3.3.1.2. Liquid Telecom was concerned that the deletion of regulation 8(7)(b) would have harmful consequences to consumers.

3.3.2. The Authority's decision

The Authority is of the view that these provisions have been catered for under the Code of Conduct for Premium Rated Services Regulations and as such should not be included in the Regulations.

3.4. **Insertion of regulation 8A(1)**

3.4.1. Submissions Received

3.4.1.1. Liquid Telecom indicated that the proposed usage notifications would only be applicable in the context of mobile services. Liquid Telecom further indicated that there are different platforms available for consumers to monitor their data usage and that it should be a consumer's responsibility to monitor usage using these platforms.

3.4.1.2. MTN stated that the Authority did not specify whether or not the proposed amendment would apply to prepaid or post-paid end-users. Furthermore, MTN stated that the provision of voice and SMS usage notification intervals of 50%, 75%, 90% and 100% may be excessive and irritate end-users. MTN was of the view that the proposed usage notification should be left to the discretion of licensees.

3.4.1.3. Vodacom submitted that the content of the notification and the "percentage depletion" notification ought not to be prescribed. Vodacom was of the view that end-users will not benefit from the proposed "percentage depletion" notification and that it will likely confuse rather than to assist end-users. Vodacom proposed a notification which would record the bundle units remaining (i.e. voice or SMS), for which it believes it would enable end-users to manage and control their usage and to proactively plan for the purchase of additional bundles or units if they so require. Vodacom suggested that a maximum of two notifications should be given to end-users before they have reached the 90% threshold of usage for services as end-users will be given sufficient time to respond after such notifications. However, Vodacom pointed out that a number of devices that use

voice and SMS services (specifically for M2M applications) do not have the facility to view such notifications.⁹

3.4.1.4. Cell C stated that it was not clear on why voice and SMS services were included in the Regulations. Cell C was of the view that the Regulations should deal with data services, not voice and SMS.

3.4.1.5. Telkom stated that it did not support the proposed percentage depletion usage notifications with respect to voice and SMS usage. Telkom proposed that the provision be adjusted to allow for actual value of data remaining instead of percentages.

3.4.1.6. Mr Mark Lister stated that usage notifications should be provided by licensees at no charge to end-users. Mr Lister further stated that the timing of the proposed usage notifications was not guaranteed and the end-user might not be able to read the messages and react timeously.¹⁰

3.4.2. The Authority's Decision

3.4.2.1. The Authority is of the view that the said notifications are necessary to empower end-users to monitor usage and limit spend to avoid or minimise bill shock as a result of out-of-bundle charges.

3.4.2.2. The Authority, however, agrees with the licensees' views that percentage depletion usage notifications, rather than the relevant unit of measure, will more than likely confuse rather than assist end-users.

3.4.2.3. The Authority has modified regulation 8A(1) accordingly. Licensees are therefore required to send notifications to end-users which records the voice and SMS bundle units remaining instead of percentage of units remaining.

⁹ Vodacom submission Para 11-19 Page 3-5

¹⁰ Mr Lister submission Page 2

3.4.2.4. The Authority has decided to reduce the usage notification percentage triggers to a minimum¹¹ of three notifications (i.e. 50%, 80% and 100% depletion) to minimise or avoid the risk of too many notifications, which could potentially confuse customers or result in customers ignoring them.

3.5. Insertion of regulation 8A(2)

3.5.1. Submissions Received

3.5.1.1. MTN was of the view that this regulation was not necessary as prepaid, hybrid or post-paid users were able to purchase or load additional airtime or SMS bundles.

3.5.1.2. Vodacom was of the view that this regulation should make it clear that the "option to buy" was not to be provided only upon depletion of the services but at any time, so as to avoid disruptions of service.

3.5.1.3. Telkom submitted that it supported this provision as it offered voice and SMS bundles to its subscribers through its self-service menu, its online portal and through the USSD option.

3.5.1.4. Cell C stated that its post-paid subscribers are already offered additional services upon depletion of allocated voice and SMS services.

3.5.2. The Authority's Decision

The Authority is of the view that this option is necessary as some of the operators do not provide post-paid users with an option to buy additional voice or SMS services, which may result in post-paid users paying out-of-bundle rates.

¹¹ Licensees can increase the number of alerts, if deemed necessary.

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3.6. Insertion of regulation 8A(3)

3.6.1. Submissions Received

- 3.6.1.1. MTN Indicated this provision was too prescriptive and did not consider interventions put in place by licensees (i.e. usage limit) to empower end-users to control and limit their spend.¹² MTN further indicated that by providing post-paid users with an option to be disconnected from accessing relevant services upon depletion of voice and or SMS bundles, the Authority was interfering with the design of its post-paid/hybrid products and is not authorised in terms of section 69(5) of the ECA.¹³
- 3.6.1.2. Vodacom submitted that this regulation was unclear as to what was the default position when the end-user fails to choose from the options provided. Vodacom stated that licensees were obliged to continue providing the services and applicable out-of-bundle rates would apply. Vodacom stated that it was unclear as to when these notifications should be sent out to the end-user (i.e. at the time of or after the depletion of the allocated services).
- 3.6.1.3. Vodacom indicated that this regulation was *ultra vires* as it amounted to the prescription of the basic product and service offering and associated price modelling, by effectively excluding a particular product offering, which is beyond what section 69 of the ECA empowers.¹⁴
- 3.6.1.4. Vodacom stated that unlike data services, voice and SMS services are used intentionally by end-users and therefore, there was unlikely to be instances of bill shock as suggested by the Authority.¹⁵
- 3.6.1.5. Vodacom stated it was technically unfeasible to provide an option to disconnect machine to machine (M2M) end-users, other than at the

¹² MTN submission para 3.2.2 Page 8

¹³ Ibid Para 3.2.4 Page 9

¹⁴ Vodacom submission para 35 Page 35-36

¹⁵ Vodacom submission para 36 Page 8

time of contracting, as there was no direct engagement with these users and M2M devices were programmed to ignore SMSs from Mobile Station International Subscriber Directory Number.¹⁶

3.6.1.6. Vodacom further stated that post-paid and hybrid end-users can buy additional voice and/or SMS services at any time (prior to and upon depletion of the allocation) and can elect to be disconnected when certain thresholds were reached using service specific account lock facility.¹⁷

3.6.1.7. Cell C was of the view that this provision would increase compliance and administrative costs without any concomitant benefit to the public.¹⁸ Cell C stated that this regulation did not make sense in the context of commercial transactions in the event that the end-user chooses the right package for their level of usage and their budget.¹⁹

3.6.1.8. Telkom supported this provision as it offered a unique spend limit functionality for management and control of out-of-bundle spend.²⁰

3.6.2. The Authority's Decision

The Authority is of the view that this provision is necessary to protect post-paid/hybrid users against the current practice of defaulting them to out-of-bundle charges upon depletion of their monthly allocation.

3.7. **Insertion of regulation 8B(1)(a)**

3.7.1. Submissions Received

3.7.1.1. MTN indicated that this provision was not necessary as it sends usage notifications to end-users and cautioned the Authority against the prescription of depletion intervals. MTN was of the view that the proposed notifications are excessive and may result in poor customer

¹⁶ Ibid para 32 Page 7

¹⁷ Ibid para 30 Page 6-7

¹⁸ Cell C submission Para 59 Page 15

¹⁹ Ibid Para 59.1 Page 15

²⁰ Telkom submission Page 5

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experience.²¹ In addition, MTN stated It had Included proactive notifications by notifying end-users when they have reached 50% and then 90% of their data bundles to assist end-users to manage and monitor their spend.²²

3.7.1.2. Vodacom submitted that the content of the notification and the "percentage depletion" notification ought not to be prescribed. Vodacom was of the view that end-users will not benefit from the proposed "percentage depletion" notification and that it will likely confuse rather than to assist end-users. Vodacom proposed a notification which records the bundle units remaining (i.e. data), which It was of the view that would enable end-users to manage and control their usage and to proactively plan for the purchase of additional bundles or units if they so require.

3.7.1.3. Vodacom suggested that a maximum of two notifications be sent to end-users before they reach the 90% threshold of usage for services as end-users will be given sufficient time to respond after such notifications.²³ However, Vodacom pointed out that a number of devices that use data services (e.g. M2M, dongles, routers, tablets, etc.) do not have the facility to view such notifications.²⁴

3.7.1.4. Cell C stated that It already provides notifications that bundles were becoming and have been depleted. Cell C stated that the proposed four increments of 50%, 75%, 90% and 100% were excessive and was of the view that It would irritate end-users, especially if the bundle was small.²⁵

3.7.1.5. Crystal Web Mobile and LEASP stated that the Implementation of regulation 8B will require that fixed line Internet Service Providers Inform customers through SMS of their data usage, with the transmission costs being borne by the ISP, operate as a USSD and not offer capped products.

²¹ MTN submission Para 4.4.4 Page 20

²² Ibid Para 3.3.4 Page 10

²³ Vodacom submission Para 11-19 Page 3-5

²⁴ Ibid Para 53 Page 12

²⁵ Cell C submission Para 58 Page 14

3.7.1.6. Telkom supported and recommended usage notifications based on the fixed absolute methodology. Currently, Telkom mobile subscribers are sent SMS notifications when they have 500MB, 100MB, 10MB and 0MB data bundles remaining on their data plans. Telkom stated that it will be difficult to follow the Authority's proposed amendment as it will have to make adjustments to each product bundle they offer, consequently being very costly.

3.7.2. The Authority's Decision

- 3.7.2.1. The Authority is of the view that the notifications are necessary to provide relevant timely information that will enable end-users to better monitor usage and limit spend to avoid or minimise bill shock as a result of high out-of-bundle charges.
- 3.7.2.2. The Authority, however, agrees with the licensees' view that percentage depletion usage notifications, rather than the relevant unit of measure, will more than likely confuse rather than assist end-users.
- 3.7.2.3. The Authority has therefore modified regulation 8B(1)(a) accordingly. Licensees must send end-users notification which include the amount of the bundle remaining (and the applicable out-of-bundle rate per MB).
- 3.7.2.4. The Authority has decided to reduce the usage notification percentage triggers to a minimum²⁶ of three notifications (i.e. 50%, 80% and 100% depletion) to minimise or avoid the risk of too many notifications, which could potentially confuse customers or result in customers ignoring them.

²⁶ Licensees can increase the number of alerts

3.8. Insertion of regulation 8B(1)(b)

3.8.1. Submissions Received

3.8.1.1. MTN was of the view that this regulation was not necessary as end-users can choose from a wide variety of additional bundles.²⁷

3.8.1.2. Vodacom stated that, contrary to the industry practice, this regulation will preclude licensees from providing end-users with an option to buy additional bundles anytime prior to depletion of the allocated data²⁸ and therefore, resulting in negative impact on end-users²⁹.

3.8.1.3. Telkom agreed with this provision as it had sufficient measures in place for end-users to purchase additional data bundles.³⁰

3.8.2. The Authority's Decision

3.8.2.1. The Authority is of the view that this provision is necessary as it is meant to empower end-users to avoid bill shock as a result of high out-of-bundle rates.

3.8.2.2. The Authority agrees with Vodacom's submission to the extent that it amended the regulation to make it clear that the option to buy additional data bundle should be provided at any time (i.e. before and after depletion of a data bundle), to minimise service interruption.

²⁷ MTN submission Para 4.4.5 Page 20

²⁸ Vodacom submission Para 37 Page 8

²⁹ Ibid Para 10 Page 10

³⁰ Telkom submission Page 7

3.9. Insertion of regulation 8B(1)(c)

3.9.1. Submissions Received

3.9.1.1. MTN submitted that this provision amounted to interference with consumer choice with regards to product selection or infringe upon the right of end-users to choose their products and services; and was not authorised in terms of section 69 of the ECA. MTN further stated that this provision was an indirect attempt by the Authority to regulate the price of data services provided to end-users.³¹ In addition, MTN stated that this provision failed to take into account measures it had put in place to ensure that end-users were able to control and limit their spend on data service, if necessary.³²

3.9.1.2. MWEB was of the view that this provision was not necessary as end-users were provided information in line with the CPA about the rules relating to out-of-bundle charges. MWEB further stated that licensees already provide end-users with monitoring tools and as such there was no need to request the end-user to opt in or opt out of out-of-bundle usage.³³

3.9.1.3. Telkom submitted that it offered the option to not to default end-users to out-of-bundle charges as a standard on its data packages, with the exception of its FreeMe bundles which are aimed at providing subscribers with continuous connectivity.³⁴ Telkom was of the view that the option not to default end-users automatically to out-of-bundle charges could lead to poor customer experience and limit end-user choice and should not be enforced through Regulations.³⁵

3.9.2. Amandla.mobi submitted that out-of-bundle pricing was not transparent and was unfair to low income customers. Amandla.mobi further stated that automatic transition from in-bundle to out-of-

³¹ MTN submission Para 2.7.3; 3.3.2 Page 6; 9

³² Ibid Para 3.3.3 Page 9-10

³³ MWEB submission Para 17 Page 4-5

³⁴ Telkom submission, Page 7

³⁵ Ibid Page 8

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bundle pricing without a customer consent to opt-in to out of bundle usage, with out-of-bundle pricing of up to 50 times in-bundle pricing, was unfair and is exploitative to the poor.³⁶

3.9.3. Amandla.mobi recommended that the default position should not be out-of-bundle usage or licensees should not provide data service which may attract out-of-bundle charges.³⁷

3.9.4. The Authority's Decision

3.9.4.1. The Authority is of the view that the provision requiring that there not be defaulting end-user to out-of-bundle usage when their data bundles are depleted will not interfere with consumer choice.

3.9.4.2. The Authority is of the view that it is empowered to impose this provision as it relates to the manner in which end-users are billed or charged for out-of-bundle usage, which is consistent with section 69(5)(d)³⁸ and (f)³⁹ of the ECA.

3.9.4.3. The Authority would like to emphasise its view that the current practice of defaulting end-users to out-of-bundle charges is unfair and exposes end-users, particularly the poor, to the risk of bill shock as a result of high out-of-bundle charges.

3.9.4.4. While the Authority recognises voluntary measures⁴⁰ put in place by licensees to ensure that end-users control and limit their spend or minimise bill shock, the Authority is concerned that these usage limits and data depletion notifications are not provided in real-time⁴¹ to allow end-users to make an informed and timely decision. In addition, the

³⁶ Amandla.mobi submission Para 2 Page 4

³⁷ Amandla.mobi submission Para 3 Page 4-5

³⁸ Section 69(5)(d) states that "*The matters which an end-user and subscriber service charter may address include but are not limited to—...(d) end-user and subscriber charging, billing, collection and credit practices...*" [our emphasis]

³⁹ Section 69(5)(f) states that "*The matters which an end-user and subscriber service charter may address include but are not limited to—...(f) any other matter of concern to end-users and subscribers.*" [our emphasis]

⁴⁰ These measures include usage limits for post-paid users and data depletion notifications via SMS, push USSD or USSD prompts when data usage reach certain thresholds.

⁴¹ MTN acknowledged that in some instances, data depletion notifications are received within 15 minutes of the data is depleted. Source: <https://mybroadband.co.za/news/cellular/234962-you-should-get-your-out-of-bundle-data-notification-straight-away.html>

Authority is of the view that the usage depletion notifications are not effective as the notifications provided by licensees do not provide information on the applicable out-of-bundle rate.

3.10. Insertion of regulation 8B(1)(d)

3.10.1. Submissions Received

3.10.1.1. ISPA⁴², WAPA⁴³ and Liquid Telecom⁴⁴ proposed that this provision should be amended to include out of bundle as follows: *"provided an option through SMS, push notification, USSD or any other applicable means to opt-in or opt-out of out of bundle usage per session."*

3.10.1.2. Liquid Telecom submitted that it was technically unfeasible to provide opt-in or opt-out per session using non-mobile data services/technologies. In addition, Liquid Telecom stated that consumers have a joint responsibility to monitor their usage and therefore, licensees should not be held solely liable for the irresponsible behaviours of some customers.⁴⁵

3.10.1.3. MTN was of the view that by the Authority prescribing the default position with regard to out-of-bundle charges will infringe upon the right of end-users to choose options that suit their needs.⁴⁶ MTN stated that it was unclear what was meant by "per session".⁴⁷

3.10.1.4. MWEB stated that this provision was impractical, unfeasible and will result in poor customer experience as the experience will not be seamless.⁴⁸

3.10.1.5. Vodacom indicated that it was not always technically feasible to obtain consent from end-users (for example corporate APN users) to charge them various options including out of bundle rates.⁴⁹ Vodacom also

⁴² ISPA submission Para 9 Page 3

⁴³ WAPA submission Para 11 Page 2

⁴⁴ Liquid Telecom submission Para 15.3 Page 5

⁴⁵ Ibid Para 15.4-15.6 Page 5

⁴⁶ MTN submission Para 3.3.5 Page 10

⁴⁷ Ibid Para 3.3.6 Page 10

⁴⁸ MWEB submission Para 17 Page 4-5

⁴⁹ Vodacom submission Para 42 Page 9

Indicated that It is not technically feasible to provide an opt-out option for out of bundle usage on a per session or bundle basis but rather It can be done at a customer level.⁵⁰

3.10.1.6. Telkom stated that It supports this provision as It had sufficient measures to allow for opt-In or opt-out of out-of-bundle usage charges.

3.10.1.7. Cell C stated that the wording in this regulation which states that "*opt-in or opt-out of data bundle usage per session*" was vague and nonsensical, and that it contradicted regulation 2.⁵¹ In addition, Cell C indicated that it was not clear what "*usage per session*" means.⁵²

3.10.1.8. Amandla.mobi indicated that, each time a data bundle was about to be depleted, a licensee must send out an SMS offering an end-user the option to opt-In to out-of-bundle charges with information on the applicable out-of-bundle rate.⁵³ Furthermore, Amandla.mobi indicated that in the absence of a reply from an end-user to opt-In to out-of-bundle charges, data service should be discontinued or cut-off and airtime usage for data service should not be allowed when an end-user had reached the data allocation limit or had depleted (or finished) the data bundle.

3.10.2. The Authority's Decision

3.10.2.1. The Authority is of the view that this provision is necessary and will not undermine customers' choice contrary to the views of some licensees.

3.10.2.2. The Authority is also of the view that this provision will ensure that end-users are fully aware of the consequences of exceeding their allocation of data to minimise higher than expected bills for data services.

⁵⁰ Ibid Para 42.6 Page 10

⁵¹ Cell C submission Para 43-44 Page 11

⁵² Ibid Para 44.2 Page 11

⁵³ Amandla.mobi submission Para 3 Page 4-5

3.10.2.3. The Authority Included *out of bundle* as suggested by ISPA and Liquid Telecom.

3.11. Insertion of regulation 8B(2)

3.11.1. Submissions Received

3.11.1.1. MTN indicated that this provision was unnecessary, logically flawed and should be deleted as it had Implemented measure to transparently communicate with end-users and to empower them to choose how to control their spend.⁵⁴

3.11.1.2. MTN⁵⁵ and Cell C⁵⁶ indicated that this provision contradicts regulation 8B(1)(d) to the extent that an end-user had opted out of out-of-bundle usage.

3.11.1.3. Telkom indicated that this provision was automatically available on all data plans with the exception of FreeMe⁵⁷ plans. Telkom was of the view that this provision will limit customer choice and will stifles competition and Innovation.

3.11.1.4. Liquid Telecom proposed that this provision be amended as follows:
"end-user opts out of further data usage following data bundle depletion, a Licensee must not permit any out of bundle data usage by that end-user until such time as that end-user purchases a new data bundle or expressly consents to the charging of out bundle rates."⁵⁸

3.11.1.5. Vodacom indicated that It was not practical for M2M users such as tracking companies, retailers, utility companies, etc. to opt-out of out of bundle usage as M2M devices are unmanned or not manned on a

⁵⁴ MTN submission Para 3.4 Page 11

⁵⁵ Ibid Para 3.4 Page 11

⁵⁶ Cell C submission Para 44 Page 11

⁵⁷ Subscribers on FreeMe plans are by default reverted to out-of-bundle usage rates. However, subscribers may change this option to be redirected to Telkom's out-of-bundle re-direct page. Additionally, post-paid subscribers can choose the amount by which they are prepared to spend on out-of-bundle usage rates once their bundles are depleted. Source: Telkom submission Page 9

⁵⁸ Liquid Telecom submission Para 15.3 Page 5

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full-time basis.⁵⁹ Vodacom also indicated that M2M users prefer post-paid tariff plans which charge out-of-bundle rates by default due to low data usage of between 1Kb and 10MB per month.⁶⁰

3.11.1.6. Furthermore, Vodacom Indicated that end-users who deplete their data bundle mid-session and do not opt-in for out-of-bundle charges will experience interrupted non-seamless data experience, which could result end-users paying to re-download the same content from the start.⁶¹

3.11.2. The Authority's Decision

3.11.2.1. After carefully considering submissions by licensees in this regard, the Authority is of the view that this provision should apply to prepaid and hybrid data users only. Unlike their post-paid counterparts⁶², prepaid and hybrid users face unique circumstances⁶³ and appropriate accommodations are necessary to assist them to minimise or avoid bill shock.

3.11.2.2. The Authority is satisfied with bill shock protection measures implemented for post-paid users. Therefore, this provision does not apply to post-paid users.

3.11.2.3. The Authority agrees with Liquid Telecom's submission and has amended the regulation accordingly.

3.11.2.4. The Authority is of the view that this provision will not limit end-users choice and lead to frustration and a poor experience. For example, Telkom has been offering this option to the majority of its subscribers and the Authority has not received complaints from

⁵⁹ Vodacom submission Para 48.2 Page 11

⁶⁰ Ibid Para 49 Page 11

⁶¹ Ibid Para 56 Page 12

⁶² Post-paid users can set a permanent monthly usage limit of greater than or equal to monthly subscription fee to control their out-of-bundle spend on data (and other services). Post-paid users can load additional data bundles on a temporary or permanent basis.

⁶³ Despite licensees implementing usage depletion notifications and advising end-users to buy data bundles to avoid being charged out-of-bundle rates, these notifications are not necessarily adequate as they are not provided in real-time all the time resulting in end-users running into out-of-bundle charges and paying high out-of-bundle rates using their airtime.

Telkom subscribers. The Authority, however, received complaints from MTN, Vodacom and Cell C subscribers about bill shock owing to high out-of-bundle rates.⁶⁴ In this respect, the Authority found that MTN, Vodacom and Cell C's submission in this regard are misguided.

3.11.2.5. The Authority is of the view that the disconnection or reconnection option should not attract fees or charges as such fees would defeat the purpose of this regulation, which is meant to empower end-users to make an informed decision whether or not to pay high out-of-bundle charges.

3.12. Insertion of regulation 8B(3)

3.12.1. Submissions Received

3.12.1.1. ISPA⁶⁵ and WAPA⁶⁶ submitted that regulation 8B(3) can be read to mean that a licensee needs to merely provide an option of data bundles with a minimum validity period of 3 years along with its data bundles with a shorter expiry period. ISPA proposed that regulation 8B(3) should be amended to state that *"A licensee must ensure that all prepaid data bundles are provided with a minimum expiry period of ..."*⁶⁷

3.12.1.2. ISPA stated that the Authority should be mindful of section 64 of the CPA as many licensees invoice data bundles monthly in advance, which blurs the lines between post-paid and prepaid.⁶⁸ ISPA⁶⁹ and WAPA⁷⁰ further proposed that definitions of the terms pre-paid and post-paid be included in the final Regulations.

⁶⁴ MTN Group CEO, Mr. Rob Shuter, and Vodacom Group CEO, Mr. Shameel Joosub, have publicly acknowledged that out-of-bundle data prices are high. Source: <https://mybroadband.co.za/news/cellular/250045-vodacom-and-mtn-subscribers-pay-up-to-2600-more-for-out-of-bundle-data.html>

⁶⁵ ISPA submission Para 10 Page 3

⁶⁶ WAPA submission Para 12 Page 2

⁶⁷ Ibid Para 10 Page 3

⁶⁸ ISPA submission Para 11 Page 3

⁶⁹ Ibid

⁷⁰ WAPA submission Para 5 Page 2

- 3.12.1.3. Liquid Telecom recommended that the Authority conduct a full regulatory Impact assessment study as it was of the view that this regulation will impose a significant overhead on licensees.⁷¹
- 3.12.1.4. MTN was of the view that the proposed validity period of 3 years was tantamount to fixing the terms of the provision of data services and will stifle competition to the detriment of end-users.⁷²
- 3.12.1.5. MTN stated that the proposed expiry period of three years will result in an increase in unearned revenue liability on MTN's balance sheet, which will impact MTN's key ratios. MTN stated that this impact will be exacerbated by the current growth in data consumption.⁷³ MTN submitted that a regulatory impact assessment study was required to fully understand the impact of the proposed amendment.⁷⁴
- 3.12.1.6. MTN indicated that the Authority incorrectly equated the purchase of a prepaid data bundle with the purchase of a prepaid voucher as envisaged in section 63(2) and (3) of the CPA.⁷⁵ MTN is of the view that section 63 ceases to apply to prepaid data bundles as section 63 required that an end-user be given a period of three (3) years within which to redeem a voucher and not a period of three (3) years to use the services (i.e. data bundles) that were made available pursuant to the purchase of a voucher.⁷⁶
- 3.12.1.7. MTN further stated that the Authority does not have the power to make pronouncements on the correct interpretation of the provisions in the CPA, particularly with respect to section 63, without any consideration of the views of the National Consumer Commission ("NCC"). MTN indicated that the NCC had not taken issue with MTN's application and interpretation of section 63.⁷⁷

⁷¹ Liquid Telecom submission Para 15.9 Page 6

⁷² MTN submission Para 3.5.2 Page 11

⁷³ Ibid Para 3.5.3.2-3.5.3.5 Page 12-13

⁷⁴ MTN supplementary submission dated 9 March 2018

⁷⁵ Ibid Para 3.5.4-3.5.11 Page 13-16

⁷⁶ Ibid Para 3.5.12 Page 17

⁷⁷ Ibid Para 3.5.13 Page 17-18

- 3.12.1.8. MTN Indicated that the proposed validity period of three (3) years will counteract section 68 of the ECA, which enjoins the Authority to ensure efficient use and allocation of scarce numbering resource.⁷⁸
- 3.12.1.9. MWEB submitted that section 63 of the CPA does not apply to prepaid data as prepaid data was not the same as a prepaid certificate, credit or voucher. Furthermore, MWEB stated that the proposed validity period of three (3) years will make it impossible for licensees to project the expected usage on their network in order to manage it.⁷⁹
- 3.12.1.10. The Free Market Foundation ("FMFSA") submitted that this provision was ambiguous as it was not clear if licensees will be required to offer data bundles with minimum validity period of three (3) years in addition to the current data bundle offerings.⁸⁰ Furthermore, FMFSA stated that this provision was *ultra vires* as it falls outside of matters contemplated in section 69(5) of the ECA.⁸¹
- 3.12.1.11. FMFSA disagreed with the Authority's interpretation of section 69(5)(f) of the ECA. FMFSA is of the view that "*any other matter of concern to end-users and subscribers*" means "*customer service*" matters of concern to end-user and it did not bear a wider meaning as proposed by the Authority in the second draft EUSC Regulations.⁸²
- 3.12.1.12. Vodacom submitted that the Authority did not have power to impose interventions in the ECA based on the Authority's interpretation of the CPA.⁸³
- 3.12.1.13. Vodacom was of the view that the interpretation and application of the CPA did not lie within the remit of the Authority but that of the NCC.⁸⁴ Vodacom was also of the view that the Authority can refer the matters of non-compliance with section 63 to the NCC who can refer the matter to the National Consumer Tribunal.⁸⁵

⁷⁸ MTN submission Para 3.5.14 Page 18

⁷⁹ MWEB submission Para 18 Page 5

⁸⁰ FMFSA submission Page 3

⁸¹ Ibid Page 5-6

⁸² Ibid Page 6

⁸³ Vodacom submission Para 69 Page 16; Para 73 Page 16

⁸⁴ Vodacom supplementary submission Para 4 Page 2

⁸⁵ Vodacom submission Para 74 Page 16

3.12.1.14. Notwithstanding the above, Vodacom Indicated that the correct interpretation of section 63(2) of the CPA required a clear understanding of section 63(1). Vodacom stated that it was important to identify the device, what was sold by Vodacom, what was bought by an end-user and the point in time at which redemption occurs and what was made available to the consumer on redemption.⁸⁶

3.12.1.15. Vodacom stated that the Authority was not empowered by legislation to prescribe validity periods for data expiry, which will directly affect and regulate the price of data services⁸⁷. Furthermore, Vodacom stated that regulation of prices did not fall within minimum standards as contemplated in section 69 of the Electronic Communications Act and also violated section 2(f)⁸⁸ and (y)⁸⁹ of the ECA

3.12.1.16. Vodacom was of the view that the prepaid vouchers sold by it comply with section 63 of the CPA as they are valid for thirty-eight (38) months from the date of issue.⁹⁰

3.12.1.17. Vodacom stated that the proposed validity period of three (3) years will limit customer choices that are available in the market and the benefit of buying data bundles with different sizes at different price points.⁹¹ Vodacom also stated that the unintended consequences of prescribing the minimum validity period of three years will be the termination of non-qualifying and lower priced offers resulting in customers paying more for data services.⁹²

3.12.1.18. Vodacom further stated that the proposed validity period of three (3) years will dilute competition⁹³ to the detriment of end-users and also

⁸⁶ Vodacom supplementary submission Para 12 Page 4

⁸⁷ Vodacom submission para 7-8 Page 3

⁸⁸ Section 2(f) enjoins the Authority to "*promote competition within the ICT sector*"

⁸⁹ Section 2(y) enjoins the Authority to "*refrain from undue interference in the commercial activities of licensees while taking into account the electronic communications needs of the public*"

⁹⁰ Vodacom supplementary submission Para 12 Page 4

⁹¹ Ibid Para 66 Page 15. Also its presentation during the public hearings held on 1 March 2018, Vodacom indicated that 62% of its subscriber base use data bundles with validity period of less than 30 days, with data bundles with shorted validity period being the most popular. For example, 1GB data bundle cost between R29 and R149 depending on the validity period.

⁹² Vodacom presentation dated 1 March 2018 Slide No. 7

⁹³ Operators will offer data bundles with the same validity period

reduce the ability of licensees to efficiently manage network use and investment.⁹⁴

3.12.1.19. Crystal Web Mobile and LEASP stated that the Authority's interpretation of section 63 of the CPA was incorrect. Crystal Web Mobile and LEASP were of the view that section 63 applied to prepaid voucher or prepaid credit balance.⁹⁵

3.12.1.20. Cell C submitted that regulation 8B(3) was not in line with the minimum standard for the quality of the products or transparent provision of information to consumers in terms of section 69(3) and (5) of the ECA.⁹⁶

3.12.1.21. Cell C indicated that the proposed three (3) year expiry period for data bundles will significantly increase costs for consumers contrary to sections 2(m)⁹⁷ and (n)⁹⁸ of the ECA.⁹⁹

3.12.1.22. Cell C indicated that the proposed three (3) year validity period will make provisioning¹⁰⁰ of capacity on its network close to impossible and resulting in increased unpredictable costs. Cell C also indicated that the proposed maximum validity period will increase its current liabilities in the form of unearned revenue, which will impact on its ability to obtain financing at a reasonable cost. Other costs expected to increase are related to information technology licenses required to maintain a subscriber on the Home Location Register, maintenance cost of data allocated over three (3) years, roaming costs, etc. Cell C indicated that these additional costs will be passed onto customers.¹⁰¹

⁹⁴ Vodacom presentation dated 1 March 2018 Slide No. 7

⁹⁵ Crystal Web Mobile and LEASP submission Para 8-9 Page 3

⁹⁶ Cell C submission Para 14-15 Page 4

⁹⁷ Section 2(m) enjoins the Authority to "ensure the provision of a variety of quality electronic communications services at reasonable prices"

⁹⁸ Section 2(n) enjoins the Authority to "promote the interests of consumers with regard to price, quality and the variety of electronic communications services"

⁹⁹ Ibid Para 18-19 Page 5

¹⁰⁰ Cell C stated that provisioning is the assessment of capacity needs to make available for network usage in a given month in order to know how much capacity to lease from its service providers

¹⁰¹ Ibid Par 21-26 Page 5-7

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3.12.1.23. Cell C stated that numbering capacity will be affected as licensees will not be able to recycle numbers if there was no activity within three (3) years.¹⁰²

3.12.1.24. Telkom stated that it offered a variety of validity periods, ranging between thirty – one (31) days and twelve (12) months. Telkom stated that extending the current data validity periods to three (3) years will have a negative impact on current data pricing and differentiation.¹⁰³

3.12.1.25. Telkom was of the view that small licensees like Telkom Mobile will be restricted in their ability to provide innovative products and pricing which differentiates it from larger operators, should this provision be promulgated in its current form.

3.12.1.26. Telkom indicated that the proposed three (3) year minimum validity period will disrupt its business model as its network was configured to support its current data plans and expiry data business rules.

3.12.1.27. Telkom raised a concern about the negative impact of extending the minimum validity period to three (3) years on numbering resources as it will be required to keep numbers active for three (3) years even if they were not used.

3.12.1.28. Amdia.mobi stated that the proposed regulation will stifle competition introduced by Cell C and Telkom Mobile to the detriment of consumers.¹⁰⁴

¹⁰² Ibid Para 29 Page 7

¹⁰³ Telkom submission Page 9-11

¹⁰⁴ Amdia.mobi submission Para 1 Page 4

3.12.1.29. Amandla.mobi was of the view that users who buy small data bundles which were depleted in less than 30 days will be disadvantaged as they were likely to pay more than what they currently pay.¹⁰⁵

3.12.1.30. Amandla.mobi recommended that the expiry period should be reduced to between ninety (90) to one hundred and twenty (120) days.¹⁰⁶

3.12.2. The Authority's Decision

3.12.2.1. The Authority deleted regulation 8B(3) of the draft second EUSSC Regulations in the final Regulations after careful consideration of submissions by interested parties. However, the Authority is of the view that the NCC, as the custodian of the CPA, should take the necessary steps to enforce compliance with section 63 of the CPA.

3.12.2.2. The Authority will provide assistance to the NCC on this matter, if necessary, in line with the Memorandum of Understanding between the Authority and NCC.

3.12.2.3. However, after consideration of submissions on the first draft EUSSC Regulations and the second draft EUSSC Regulations, the Authority has included the provision for roll over of unused data for all users before expiry. The Authority is of the view that the business rules (including terms and conditions of the roll over) relating to the roll over of unused data should be determined by licensees. In addition, the Authority is of the view that rolled over data should be depleted first before the depletion of new allocated data bundles to ensure that end-users derive maximum benefit from the rolled over data.

¹⁰⁵ Ibid Para 1 Page 4

¹⁰⁶ Ibid Para 3 Page 4

3.12.2.4. Without being overly prescriptive in respect of the expiry period of rolled over data, the Authority would like to encourage Licensees not to expire rolled over data before the expiry date of new allocated data bundle.

3.12.2.5. The Authority is of the view that this provision will benefit end-users by minimising the risk of premature expiry of data bundles. The Authority is also of the view that this provision will not impact negatively on licensees as some licensees are offering this option to their subscribers.

3.13. Insertion of regulation 8B(4)

3.13.1. Submissions Received

3.13.1.1. ISPA stated that regulation 8B(4) overlooked the difference between Electronic Communications Network Services and Electronic Communications Services as data bundles are allocated to the end user by the ECS licensee who provides access to the network by an ECNS. ISPA stated that end-users using the same ECS provider do not necessarily have the same ECNS provider.¹⁰⁷

3.13.1.2. ISPA further stated that the ability to transfer rolled over data between users on the same ECS who in turn use the same ECNS required software development which would require considerable amount of time. ISPA also stated that with regard to ECS providers using different ECNS service providers, data transfer will not be technically feasible.

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3.13.1.3. ISPA stated that this regulation should be deleted and replaced with a regulation governing the practice with regard to depletion of rolled-over unused data. ISPA recommended that regulation 8B4 be replaced and amended as follows:

¹⁰⁷ ISPA submission Para 12 Page 4

¹⁰⁸ Ibid Para 13 Page 4

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"Where data has been rolled over for post-paid users, a Licensee must account for the data in such a manner that the oldest allocation of data is depleted before more recent allocations of data." ¹⁰⁹

3.13.1.4. Liquid Telecom supported this provision. Liquid Telecom was however of the opinion that this provision was only technically feasible for licensees with Integrated ECNS and ECS operations.¹¹⁰

3.13.1.5. Liquid Telecom was of the view that the proposed transfer of data would require complex and time consuming development and also could result in end-users transferring data into unlicensed operators or a reseller without reseller exemption and could be used for the purposes of money laundering.¹¹¹

3.13.1.6. MTN stated that the proposed option to roll over unused data was overly prescriptive.¹¹²

3.13.1.7. MTN stated that it was providing an option to transfer data to its customers. However, MTN cautioned the Authority that this provision is overly prescriptive and amounts to an attempt by the Authority to prescribe contractual terms governing the provision of data services to end-users. MTN stated that this was further not in line with section 69(5) of the ECA.

3.13.1.8. MTN submitted that regulation 8B(4) should be deleted in its entirety.

3.13.1.9. MWEB supported the proposed option with regard to roll over of unused data.¹¹³

3.13.1.10. MWEB was of the view that the proposed option to transfer data to other users would create an administrative burden on licensees which could result in increases in the price of data services.¹¹⁴

¹⁰⁹ ISPA submission Para 14-15 Page 4

¹¹⁰ Liquid Telecom Para 12.11-15.12 Page 6

¹¹¹ Liquid Telecom Para 15.3-15.4 Page 6-7

¹¹² MTN submission Para 3.6.1 Page 19

¹¹³ MWEB submission Para 19 Page 5

¹¹⁴ Ibid

- 3.13.1.11. FMFSA stated that this provision requires licensees to offer a choice to end-users on unrelated issues. In addition, FMFSA stated that this provision is prescriptive and intrudes in the commercial activities of licensees, which is *ultra vires*.¹¹⁵
- 3.13.1.12. Vodacom stated that this provision is ultra vires the powers conferred to the Authority in terms of section 69 of the ECA.¹¹⁶ Vodacom was of the view that the motivation¹¹⁷ for this provision did not justify regulation of roll over or transfer of data.
- 3.13.1.13. WAPA was of the view that this provision will result in increased data prices as licensees would be required to develop systems to comply with it especially where end-users are connected to the same ECS service provider who was provided access by different ENCS service provider.¹¹⁸
- 3.13.1.14. The NCC submitted that this provision contradicted section 14 and regulation 15 of the CPA as it permits the forfeiture of rolled over data that remained beyond the next billing period.
- 3.13.1.15. Cell C stated that it allows its post-paid users to roll over data for one calendar month and transfer of data among its subscribers¹¹⁹. However, Cell C was of the view that this provision will make it difficult for licensees to estimate network capacity and this may result in overprovision of capacity on its network.¹²⁰
- 3.13.1.16. Telkom stated that the transfer of data between different data bundles was complex and implementing this proposed option will result in increased costs which will be passed onto consumers in the form of increase in data prices.¹²¹

¹¹⁵ Free Market Foundation submission Page 6-8

¹¹⁶ Vodacom submission Para 78-79 Page 17

¹¹⁷ Second draft EUSSC Regulations Page 26

¹¹⁸ WAPA submission Para 13 Page 2-3

¹¹⁹ Cell C submission Para 48 Page 12

¹²⁰ Ibid Para 49 Page 12

¹²¹ Telkom submission Page 13

3.13.2. The Authority's Decision

After consideration of submissions on the second draft EUSC Regulations, the Authority has amended the provision for transfer of data to allow all end-users to transfer data to other users on the same network. Similar to rollover of unused data provision, the Authority is of the considered view that transfer of data provision will benefit end-users as they will be able to manage the risk of expiry of unused data. The Authority is also of the view that this provision will not impact negatively on licensees as some licensees are offering this option to their subscribers.

3.14. **Insertion of regulation 8(C)(1)**

3.14.1. Submissions Received

3.14.1.1. ISPA was of the view that this provision was applicable to mobile operators. ISPA recommended that the Regulations be explicit in this regard.¹²²

3.14.1.2. MWEB was of the view that educational awareness campaigns should be conducted by the Authority, not licensees, to ensure consistency and that the correct message is conveyed to end-users.¹²³

3.14.1.3. WAPA recommended the deletion of this provision or amendment to indicate which category of licensees will be required to conduct the proposed campaigns.¹²⁴

3.14.1.4. Telkom supported this provision and was of the view that it complies with the proposed regulation.¹²⁵

¹²² ISPA submission Para 17 Page 5

¹²³ MWEB submission Para 20 Page 5

¹²⁴ WAPA submission 15 Page 3

¹²⁵ Telkom submission Page 13-15

3.14.2. The Authority's Decision

The Authority is of the view that educational awareness campaigns are necessary particularly given the growth in data penetration and smartphone penetration. The Authority is also of the view that this provision will assist end-users to, among others, to better monitor and manage the use of their devices and avoid unexpected data charges.

3.15. **Insertion of regulation 8(C)2**

3.15.1. Submission Received

3.15.1.1. Telkom was of the view that the Authority should not prescribe the number of awareness campaigns that should be carried out by operators.

3.15.2. The Authority's Decision

The Authority is of the view that a minimum of four campaign will not be burdensome on licensees.

3.16. **Amendment to regulation 13**

3.16.1. No submissions received.

3.17. **Short Title and Commencement**

3.17.1. Submission Received

3.17.1.1. WAPA recommended that the Authority defer the implementation of the Regulations to after the publication thereof to ensure that licensees understand how to comply with the Regulations.

3.17.2. The Authority's Decision

The Authority agreed with WAPA and has amended this regulation accordingly.

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28 May 2018

Councillor B Mokhele
ICASA
Pinmill Farm
164 Katherine Street
Sandton

Per Email: chairperson@icasa.org.za
BMokhele@icasa.org.za

Dear Madam

Re: Published final amended End-user and Subscriber Service charter regulations

1. Cell C's letter dated 4 May 2018 and the Authority's published final End-user and Subscriber Service Charter amendment regulations ("amended regulations") refers.
2. Cell C would like to thank the Authority for finalising these amended regulations and providing a reasons document as a supplement to amended regulations. It is Cell C's understanding that the reasons document provides the background to the Authority's decisions in finalising the amended regulations. The reasons document provides certainty in cases where the amended regulations require this certainty. It is under this understanding and Cell C's further analysis of implications of the amended regulations we write to the Authority. Following our concerns raised previously, Cell C is now better placed to understand the full extent of the changes required to its systems and business processes. This has allowed Cell C determine the estimated timeframe to implement these changes.
3. To date Cell C has met and consulted with relevant stakeholders affected by the requirements of the amended regulations to conduct technical assessments and business analysis both in the technical and commercial environments. The technical analysis could only proceed once the commercial analysis and implementation plan was agreed upon and completed.
4. From a commercial perspective, all of Cell C's data plans, data bundles, voice and sms service offerings across its prepaid, hybrid and post-paid (this includes C-Fibre offerings associated with data plans, data bundles, voice and SMS) products are affected by the 8 changes required by the amended regulations. The 8 regulated changes are:

- i) usage notifications for voice and sms;
- ii) usage notifications for data;
- iii) option for voice and sms offerings for post-paid subscribers;
- iv) out of bundle opt-out choice for voice/sms;
- v) opt-in consent for data bundles;
- vi) option to buy data bundles by all types of subscribers;
- vii) rollover of unused data before expiry date; and
- viii) transfer of data to other end-users on the same network by all subscribers.

Therefore for each regulatory change requirement, Cell C has to ensure that all its existing, legacy, new and planned products comply with the amended regulations. A list of these products (approximately 119 primary products with secondary options under each product) have to be compiled and analysed. Furthermore each product with its unique Terms and Conditions have to be analysed, reviewed and amended to accommodate the requirements in the amended regulations.

5. To support and effect the changes as a consequence of the amended regulations, the technical systems (Cell C IN Platforms which includes the Business Support Systems ("BSS"), technical frontend interfaces and backend systems) have to be assessed to establish the changes required, and thereafter the Development and IT configurations systems. It is important to note that failure to correctly implement and test changes on the network poses a huge risk to the subscriber experience where customers may be incorrectly billed or encounter poor quality of service. A scope of work has to be prepared and aligned to the commercial product requirements. Cell C had to prepare various business specifications requirements ("BRS") that contain the scope of work, dependencies, critical success factors, risks and limitations, detailed business rules, product requirements and terms and conditions.

6. Cell C has identified the following systems that require changes and has prepared the following high level development project plan for the its retail BSS:

a) Customer Relationship Manager (CRM)

- Point of sale
- Call Centre
- Customer profile and options management
- Product definition

b) Converged Billing System (CBS)

- Real-time Online Billing for Prepaid and Post-paid and
- Processing of bills and accounts
- Communication of notifications
- Enforcement of limits
- Tariff definition

c) Middleware

This is the enterprise Integration layer which is used to enable the integration of software applications

Milestones	#weeks	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26
Business Requirements*	4			*																							
Technical Design	3																										
Detail Design	1																										
Implementation Order	1																										
Build CRM, CBS	5																										
Build Middleware	4																										
Configuration of Rules	3																										
Integration testing	2																										
System integration testing	5																										
User acceptance testing	2																										
Implementation	1																										
Business Simulation	1																										

7. As previously stated, the technical analysis of the impact of these proposed amended regulations includes the changes required across Cell C network and wholesale partner networks as a consequence of the coming into effect of the proposed amended regulations. Cell C and its wholesale partners, the Mobile Virtual Network Operators ("MVNO's"), Mobile Virtual Network Enabler (MVNE's), Business Service Providers ("BSP") conducted a similar exercise to that of the Cell C retail division as stated above. Initially Cell C's wholesale division and its MVNOs/MVNE partners conducted a commercial assessment which then informed the preparation of various business specifications requirements ("BRS") to accommodate the changes for the MVNO's and MVNE that are hosted on internal Cell C technical platforms and as well as the external standalone technical platforms that are supported by third parties.



8. Cell C has identified the following systems that require changes and has prepared the following high level development project plan for the its MVNO (MVNE) wholesale partner networks:

- a) CD Rator (MVNO)
- b) Customer Relationship Manager (CRM)
 - Call Centre
 - Product Definition
- c) Online Charging System (OCS)
 - Real-time Online Billing for Prepaid
 - Products
 - Communication of notifications
 - Enforcement of limits
 - Tariff definition
 - Callback / notification definitions
- d) Enterprise Service Bus (ESB)
 - Notification transport layers
 - WSDL definitions
- e) Converged Billing System (CBS-Cell C)
 - Real-time Online Billing for Prepaid and Post-paid and
 - Processing of bills and accounts
 - Communication of notifications
 - Enforcement of limits
 - Tariff definition
- f) Middleware
 - This is the enterprise integration layer which is used to enable the integration of software applications

Milestones	Weeks	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
Business Requirement	3																									
Technical Design	4																									
Detail Design	2																									
Implementation Order	2																									
Build CD Rator and Middleware	5																									
Configuration of Rules	4																									
Integration Testing	3																									
System Integration Testing	2																									
User Acceptance Testing	3																									
Implementation	1																									
Business Simulation	1																									



9. As highlighted in our previous correspondence and for the reasons stated above, it is completely impossible from a technical perspective for Cell C and our wholesale business partners to comply with the amended regulations and implement these regulated changes within the prescribed one (1) month period. Cell C's estimates, after carefully scoping the project, that it would require a minimum of a further six (6) months to ensure implementation, testing and post production. Therefore, Cell C seeks an undertaking that the Authority will grant an extension of six (6) months for the implementation of the amended regulations in order to make it possible to comply.

We trust that the above is in order and await your response.

Cell C's rights remain reserved.

Yours sincerely

Themba Phiri
Executive Head: Regulatory

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

CASE NO:

In the matter between:

CELL C LIMITED

Applicant

and

**THE INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA**

First Respondent

**THE CHAIRPERSON, INDEPENDENT
COMMUNICATIONS AUTHORITY OF SOUTH
AFRICA
AMANDLA.MOBI**

Second Respondent

CRYSTAL WEB MOBILE AND LEASP (PTY) LTD

Fourth Respondent

FREE MARKET FOUNDATION

Fifth Respondent

**INTERNET SERVICE PROVIDERS' ASSOCIATION
NPC**

Sixth Respondent

**LIQUID TELECOMMUNICATIONS SOUTH AFRICA
(PTY) LTD**

Seventh Respondent

MARK P LISTER

Eighth Respondent

**MOBILE TELEPHONE COMMUNICATIONS (PTY)
LTD**

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MWEB

Tenth Respondent

NATIONAL CONSUMER COMMISSION

Eleventh Respondent

**WIRELESS ACCESS PROVIDERS' ASSOCIATION
NPO**

Twelfth Respondent

TELKOM SOC SA LTD

Thirteenth Respondent

VODACOM (PTY) LTD

Fourteenth Respondent

ff *15*

CONFIRMATORY AFFIDAVIT

I, the undersigned,

THEMBA PHIRI

do hereby make oath that:

1. I am an adult male businessman who is currently employed as the Executive Head of Regulatory at Cell C Limited.
2. I confirm that the facts set out in this affidavit are true and correct and fall within my own knowledge.
3. I have read the founding affidavit deposed by GRAHAM NEIL MACKINNON and I confirm the statements contained in the affidavit as far as it relates to me.


P.F.



THEMBA PHIRI

Leana Engelbrecht certify that the Deponent has acknowledged that he knows and understands the contents this affidavit, confirmed he had no objection to taking the prescribed oath and finds same binding on his conscience. Signed and sworn before me at Sandton on this 6th day of June 2018 after having complied with the regulations in the Government Notice dated July 1972 (as amended) pertaining to the prescribed oath.



COMMISSIONER OF OATHS

Full names:

Designation:

Address:

LEANA ENGELBRECHT

Commissioner of Oaths

Practising Attorney R.S.A.

1 Commerce Square, 39 Rivonia Road
 (Cnr Melling & Melville Roads), Sandhurst 2196
 Tel: 011 911 4300

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ALISTAIR MACLEAN

do hereby make oath that:

1. I am an adult male businessman who is currently employed as the Executive Head: BSS Operations and Delivery at Cell C Limited.
2. I confirm that the facts set out in this affidavit are true and correct and fall within my own knowledge.
3. I have read the founding affidavit deposed by GRAHAM NEIL MACKINNON and I confirm the statements as far as it relates to my role as a technical executive in the process.
4. I confirm that since the promulgation of the End-user and Subscriber Service Charter Amendment Regulations ("Amendment Regulations") Cell C has pro-



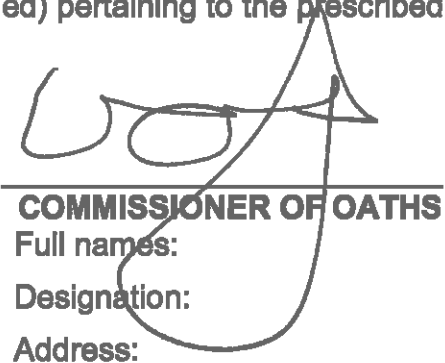
actively undertaken technical assessments and business analysis, and I have been integrally involved in that process.

5. I believe that it will not be possible for Cell C to comply with the one-month implementation period provided for in the Amendment Regulations, as prescribed by the Independent Communications Authority of South Africa.



ALISTAIR MACLEAN

Leana Engelbrecht certify that the Deponent has acknowledged that he knows and understands the contents this affidavit, confirmed he had no objection to taking the prescribed oath and finds same binding on his conscience. Signed and sworn before me at Sandton on this 6th day of June 2018 after having complied with the regulations in the Government Notice dated July 1972 (as amended) pertaining to the prescribed oath.



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LS
M

CONFIRMATORY AFFIDAVIT

I, the undersigned,

BJORN FLORMANN

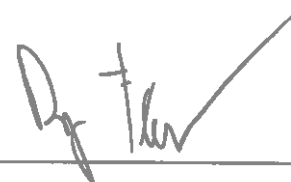
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3. I have read the founding affidavit deposed by GRAHAM NEIL MACKINNON and I confirm the statements as far as it relates to my role as a business executive in the process.
4. I confirm that since the promulgation of the End-user and Subscriber Service Charter Amendment Regulations ("Amendment Regulations") Cell C has pro-



actively undertaken technical assessments and business analysis, and I have been integrally involved in that process.

5. I believe that it will not be possible for Cell C to comply with the one-month implementation period provided for in the Amendment Regulations, as prescribed by the Independent Communications Authority of South Africa.



BJORN FLORINMANN

I Leana Engelbrecht certify that the Deponent has acknowledged that he knows and understands the contents this affidavit, confirmed he had no objection to taking the prescribed oath and finds same binding on his conscience. Signed and sworn before me at Sandton on this 6th day of June 2018 after having complied with the regulations in the Government Notice dated July 1972 (as amended) pertaining to the prescribed oath.



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**Fourteenth
Respondent**

Handwritten signature/initials

CONFIRMATORY AFFIDAVIT

I, the undersigned,

BLUE HADLOW

do hereby make oath that:

1. I am an adult male businessman who is currently employed as the Technical Director as Vas X Dynamic Innovations.
2. I confirm that the facts set out in this affidavit are true and correct and fall within my own knowledge.
3. I have read the founding affidavit deposed by GRAHAM NEIL MACKINNON and I confirm the statements as far as it relates to my role as technical expert to Cell C in these proceedings.
4. I confirm that since the promulgation of the End-user and Subscriber Service Charter Amendment Regulations ("Amendment Regulations") Cell C has pro-

at 15

actively undertaken technical assessments and business analysis, and I have been integrally involved in that process.

5. I believe that it will not be possible for Cell C to comply with the one-month implementation period provided for in the Amendment Regulations, as prescribed by the Independent Communications Authority of South Africa.

Blue Hadlow

BLUE HADLOW

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[Signature]
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Respondent


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CONFIRMATORY AFFIDAVIT

I, the undersigned,

JIM WEIJING

do hereby make oath that:

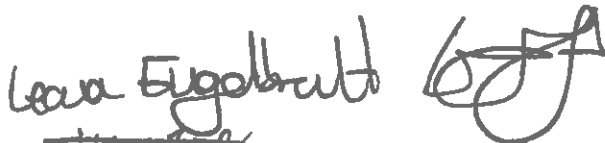
1. I am an adult male businessman who is currently employed as the Cell C South Africa BEAM Project Director at Huawei technologies South Africa Proprietary Limited.
2. I confirm that the facts set out in this affidavit are true and correct and fall within my own knowledge.
3. I have read the founding affidavit deposed by GRAHAM NEIL MACKINNON and I confirm the statements as far as it relates to my role as a technical director.


Wei

4. I confirm that since the promulgation of the End-user and Subscriber Service Charter Amendment Regulations ("Amendment Regulations") Cell C has pro-actively undertaken technical assessments and business analysis, and I have been integrally involved in that process.
5. I believe that it will not be possible for Cell C to comply with the one-month implementation period provided for in the Amendment Regulations, as prescribed by the Independent Communications Authority of South Africa.



JIM WEIJING



I Weijing certify that the Deponent has acknowledged that he knows and understands the contents this affidavit, confirmed he had no objection to taking the prescribed oath and finds same binding on his conscience. Signed and sworn before me at Sandhurst on this 6th day of June 2018 after having complied with the regulations in the Government Notice dated July 1972 (as amended) pertaining to the prescribed oath.



COMMISSIONER OF OATHS

Full names:

Designation:

Address:

LEANA ENGELBRECHT
 Commissioner of Oaths
 Practising Attorney R.S.A.
 1 Commerce Square, 39 Rivonia Road
 (Cnr Helling & Melville Roads), Sandhurst 2196
 Tel: 011 911 4300

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

CASE NO:

In the matter between:

CELL C LIMITED

Applicant

and

**THE INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA**

First Respondent

**THE CHAIRPERSON, INDEPENDENT
COMMUNICATIONS AUTHORITY OF SOUTH
AFRICA
AMANDLA.MOBI**

Second Respondent

CRYSTAL WEB MOBILE AND LEASP (PTY) LTD

Third Respondent

FREE MARKET FOUNDATION

Fourth Respondent

**INTERNET SERVICE PROVIDERS' ASSOCIATION
NPC**

Fifth Respondent

Sixth Respondent

**LIQUID TELECOMMUNICATIONS SOUTH AFRICA
(PTY) LTD**

Seventh Respondent

MARK P LISTER

Eighth Respondent

**MOBILE TELEPHONE COMMUNICATIONS (PTY)
LTD**

Ninth Respondent

MWEB

Tenth Respondent

NATIONAL CONSUMER COMMISSION

Eleventh Respondent

**WIRELESS ACCESS PROVIDERS' ASSOCIATION
NPO**

Twelfth Respondent

TELKOM SOC SA LTD

Thirteenth Respondent

VODACOM (PTY) LTD

**Fourteenth
Respondent**

CONFIRMATORY AFFIDAVIT

I, the undersigned,

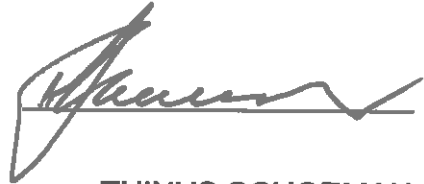
THINUS SCHOEMAN

do hereby make oath that:

1. I am an adult male businessman who is currently employed as the Senior Manager: Software Quality Assurance at iLab (Pty) Ltd.
2. I confirm that the facts set out in this affidavit are true and correct and fall within my own knowledge.
3. I have read the founding affidavit deposed by GRAHAM NEIL MACKINNON and I confirm the statements as far as it relates to my role as technical expert to Cell C in these proceedings.
4. I confirm that since the promulgation of the End-user and Subscriber Service Charter Amendment Regulations ("Amendment Regulations") Cell C has pro-actively undertaken technical assessments and business analysis, and I have been integrally involved in that process.



5. I believe that it will not be possible for Cell C to comply with the one-month implementation period provided for in the Amendment Regulations, as prescribed by the Independent Communications Authority of South Africa.



THINUS SCHOEMAN

I Leana Engelbrecht certify that the Deponent has acknowledged that he knows and understands the contents this affidavit, confirmed he had no objection to taking the prescribed oath and finds same binding on his conscience. Signed and sworn before me at Sandhurst on this 6th day of June 2018 after having complied with the regulations in the Government Notice dated July 1972 (as amended) pertaining to the prescribed oath.



COMMISSIONER OF OATHS
Full names:
Designation:
Address:

LEANA ENGELBRECHT
Commissioner of Oaths
Practising Attorney R.S.A.
1 Commerce Square, 39 Rivonia Road
(Cnr Helling & Melville Roads), Sandhurst 2196
Tel: 011 911 4300