CELL C™

THE POWER IS IN YOUR HANDS

29 February 2012

Ms Yolisa Kedama

Manager: Radio Frequency Spectrum Engineering

ICASA

Private Bag x 10002

Sandton

2146

Per email: ykedama@icasa.org.za

chairperson@icasa.org.za

Dear Madam

Re: Draft Spectrum Assignment Plan for the radio frequency range 790-862Mhz (800Mhz) and 2500-2690Mhz (2.6Ghz) and Invitation to Apply for Radio Frequency Licence

1. Cell C welcomes the ICASA draft regulations as contained in Government Gazettes 34872 (Notice 911 and 912 of 2011) and 34961 (Notice 44 of 2012) seeking comments on the draft Spectrum Assignment Plan and the draft Invitation to Apply for Radio Frequency Licence.

2. Cell C thanks the Authority for the extension granted until today and appreciates the opportunity to provide written comments in terms of the draft regulations.

3. Cell C wishes to make an oral submission if a public hearing is convened.

4. Please find attached Cell C's written submission (14 pages) in response to the draft Spectrum Assignment Plan and draft Invitation to Apply for Radio Frequency Licence.

Yours sincerely

pp

Mothibi Ramusi
Executive Head: Regulatory Affairs

SUBMISSION

BY

CELL C (PTY) LTD

on

THE DRAFT SPECTRUM ASSIGNMENT PLAN FOR THE COMBINED LICENSING OF THE 800 MHZ AND 2.6 GHZ BANDS, AND THE DRAFT INVITATION TO APPLY FOR A RADIO FREQUENCY SPECTRUM LICENCE TO PROVIDE MOBILE BROADBAND WIRELESS ACCESS SERVICES FOR URBAN AND RURAL AREAS USING THE SAME COMPLEMENTARY BANDS

29 February 2012

1. Introduction

1.1 Cell C is pleased to participate in this consultation and always keen to participate in developmental processes.

1.2 We do, however, have some serious concerns about the Draft Spectrum Assignment Plan (Draft Plan) and Invitation to Apply for Spectrum[1] (Draft ITA) from an administrative point of view, and as the draft documents do not, in our view, give sufficient regulatory certainty to existing licensees, investors and/or prospective applicants, to encourage them to participate in what could be a very exciting and important process.

1.3 We have set out our concerns in 3 main sections in this submission:

1.3.1 Section 2: Administrative issues;

1.3.2 Section 3: Regulatory certainty; and

1.3.3 Section 4: Additional and specific comments.

1.4 Our recommendations in brief are set out in section 5. We have also attached *Appendix 1* which sets out legislative references in full.

2. Administrative issues

2.1 ICASA issued the Draft Plan and Draft ITA at almost the same time as the Department of Communications issued draft Policy Directions to ICASA in relation to the same bands, namely the 800MHz and 2.GHz bands (Draft Policy Directions)[2]. There does not appear to have been any co-ordination between ICASA and the DOC in relation to the draft documents.

2.2 This is lamentable given the requirements of the Constitution in relation to co-operative governance at sections 40[3] and 41[4]. The administrative law implications are also extremely serious, which include the failure by ICASA to adhere to the requirements of the Electronic Communications Act, 2005 (ECA). We say this because the Constitutional right to just administrative action and administrative action that is "lawful, reasonable and procedurally fair" and conversely, the obligation to act in this way, applies to all "administrators". ICASA is such an administrator.

2.2.1 The Minister may make policy on any matter under section 3(1) of the ECA including <u>spectrum;</u> universal service and access; promoting universal service and ECS in under-serviced areas; mechanisms to promote the participation of SMME's in the ICT sector; the control, direction and role of SOCs subject to the Companies Act, 2008, and Broadcasting Acts; and any other policy which may be necessary for the application of the ECA or the related legislation. These are the areas which are most relevant to the Draft Plan and Draft ITA, but the Minister has rights in other areas too. We have attached as *Appendix 2*, a table setting out the rights and powers of each of the Minister and ICASA.

---

[1] *Gazette* 34872 of 15 December 2011.

[2] *Gazette* 34848 of 14 December 2011.

[3] Please see Appendix 1.

[4] Please see Appendix 1.

2.2.2 The Minister may also issue policy directions to ICASA under section 3(2) of the ECA on:

(a) The undertaking of an inquiry in terms of section 4B of the ICASA Act[5] on any matter within ICASA's jurisdiction and the submission of reports to the Minister on that matter; and

(b) The determination of priorities for the development of electronic communications networks and ECS or any other service contemplated in chapter 3.

2.3 ICASA must consider policies and policy directions from the Minister, under section 3(4) of the ECA. Cell C notes that there are 2 types of decision-making that ICASA can undertake, mandatory and discretionary decision-making. The issuing of a policy direction by the Minister under the ECA is clearly an instance in which ICASA has to make a mandatory decision; that is, it must consider policy directions. If it appears that ICASA has failed to consider Ministerial policy directions (taking all relevant factors into account), ICASA may be considered to be acting outside its mandate and so unlawfully.

2.4 The Minister is the custodian of spectrum because this is a national resource. Whilst the broad wording of section 30(1) suggests that ICASA controls, plans, administers and manages the use and licensing of spectrum, this authority is tempered by the wording of section 3(1) in relation to the making of policy, and section 34 in several respects. The Minister must approve the national radio frequency plan under sections 34(2) and 34(10). Section 1 of the ECA defines a "radio frequency plan" as including "a plan ... for the migration of systems and equipment of existing users within specific radio frequency bands ... to different frequency bands". The Minister must approve the migration of any users under section 34(16). ICASA also has to make a mandatory decision with regard to co-ordination of a plan for migration under section 34(7)(c)(iii); that is, it has to consult with the Minister with regard to co-ordination of such a plan.

2.5 The Radio Frequency Spectrum Regulations, 2011, suggest that ICASA need not obtain approval from the Minister for a "spectrum assignment plan", but as the ECA does not at any point refer to such a plan[6], we must assume that the plan that is being referred to is in fact the national radio frequency plan referred to section 34 of the ECA. It appears that it is this national radio frequency plan which ICASA currently proposes to make changes to under the Draft Plan. Changes to the radio frequency plan must of course be approved by the Minister, not only because sections 34 (2) and 34(10) of the ECA mandate it, but also because assignments are largely determined by the ITU (per the World Radiocommunication Conferences (WRC)) which relationship the Minister is responsible for[7]. We deal with this in more detail below, but we also note at this point that if ICASA consulted with the Minister in relation to the migration of Neotel and Sentech under section 34(16), this consultation was not made public. If there was no consultation, this omission, coupled with the other flaws in the proposed award to these parties of spectrum outside of any formal process, may well render the proposed migration invalid.

2.6 ICASA proposes to deal with a national resource in the Draft Plan and Draft ITA. From the absence of any indication to the contrary, it appears that ICASA proposes to deal with it in the

[5] Please see Appendix 1.

[6] See Cell C's submission on the draft Radio Frequency Spectrum Regulations of November 2010, at recommendation 4.

[7] We note that several resolutions were adopted at WRC 2012 and some agenda items proposed for WRC 2015, to do with mobile communications. No doubt these will be considered by the Minister in finalizing the policy directions.

absence of specific policy directions. We say this because although ICASA notes at paragraphs 4.1 and 4.2 of the Draft Plan and Draft ITA that government (the Department of Communications in this case) committed to "making broadband available to all its citizens ..." in the Broadband Policy of 2010, and that the Presidency published a national development plan (Vision 2030) which seeks to address spectrum allocation, strategies for universal access, market entry and a technology-neutral licensing regime, ICASA has issued the Draft Plan and Draft ITA without a clear link to policy directions from the Minister in this regard. ICASA clearly recognises that policy goals are set by government. Cell C does not understand therefore why ICASA did not wait for the Draft Policy Directions from the Department of Communications to be finalized prior to embarking on a nationally important programme to allocate valuable spectrum.

2.7 Section 3(9) of the ECA specifically permits ICASA to make recommendations to the Minister on policy matters. If ICASA was concerned about the issue of broadband, universal access or market entry in the context of spectrum, the proper route, in Cell C's view, would have been for ICASA to have made recommendations to the Minister. There is currently no evidence to this effect.

2.8 It goes without saying therefore that until the Draft Policy Directions have been finalised, ICASA may not itself finalise the Draft Plan or Draft ITA. This precludes any activity proposed "in parallel" with the Ministerial process. It is also legally impossible for the Policy Directions to "align" with the Draft Plan and/or Draft ITA.

2.9 It is our view that, were ICASA to attempt to finalise the Draft Plan or the Draft ITA in the absence of the final version of the Draft Policy Directions or in spite of consultations presently being conducted by the Department of Communications with regard to the Draft Policy Directions, that action would be challengeable under the principles of administrative justice.

2.10 ICASA is an independent regulatory authority and its independence is not in question here. ICASA is however an administrator, and in carrying out its powers and functions, it must always be mindful of its duties as such an administrator. As ICASA is obliged to act "in the public interest", ICASA would therefore also fall foul of its mandate under the ICASA Act should it proceed further with the Draft Plan and ITA in the absence of the final version of the Draft Policy Directions.

2.11 When considered alongside all the other issues we have noted in this submission, it is clear that ICASA's Draft Plan and Draft ITA could also be considered to be so vague so as to not be capable of proper interpretation, never mind implementation, which in fact would render them capable of being challenged on this basis alone, under the principles of administrative justice. This immense lack of clarity as regarding the Draft Plan and Draft ITA are elaborated in section 3 of this submission below.

3. Lack of regulatory certainty

3.1 Cell C cannot sufficiently stress the importance of creating regulatory certainty for investors and prospective applicants alike in the current process. The Draft Plan and Draft ITA however raise more questions rather than provide any clarity as to future of licensing in the all-important 800 MHz and 2.6 GHz bands.

3.2 The ICT Regulation Toolkit, developed in co-operation with the International Telecommunication Union (ITU), provides in relation to various activities[8] (in this case privatisation and licensing, but the principles are generally applicable) that:

"It is often difficult to attract investment in ICT markets in developing and transitional economies. Different circumstances prevail in these economies, due to a perception of high country risk and economic, national security or governance problems. Most countries with such economies do not have clear or consistent policies or frameworks for the regulation of the ICT sector. Where it is not possible to develop a stable and credible regulatory framework quickly, it is important to develop authorizations that are clear and detailed in order to facilitate privatization and liberalization initiatives. Such authorizations may be subject to replacement by a more comprehensive regulatory framework once it is developed. However, in such circumstances, the basic economic rights of ICT investors should be protected.

There are two key objectives in preparing such individual licences:

<u>Regulatory Certainty</u>-Where privatization and licensing transactions are implemented before a clear regulatory framework has been developed, the rights and obligations of service providers should be clearly defined in authorizations. Regulatory certainty on key business issues, such as interconnection, price regulation and competitive safeguards, promotes the success of privatization and market liberalization initiatives. Uncertainty reduces investor confidence. As a result, it usually also reduces the potential proceeds to governments from privatization sales or licence fees ...

<u>Detailed individual licences have particular importance in emerging and transitional economies that have not yet developed a comprehensive or stable regulatory framework. In such a context, licences provide certainty for investors and lenders. This certainty is often required before investors will provide the millions or billions of dollars required to install or upgrade telecommunications infrastructure.</u>"[9] [emphases added]

3.3 We must firstly point out the lack of draft licence conditions appended to the ITA. Potential applicants therefore cannot know with any certainty what their obligations might be. This uncertainty is compounded by the fact that the current review of universal service obligations (USOs) commenced by ICASA in 2010 remains incomplete. As these USOs have in the past been attached to spectrum frequency licences such as in the 900 MHz, 1800 MHz and 2100 MHz band, it is entirely reasonable to expect that USOs may also be attached to licences issued by ICASA in the 800 MHz and 2.6 GHz bands. However, owing to the incompleteness of the review of USOs, investors and prospective applicants are left in the dark, and so cannot apply in confidence with regard to future investment and/or rollout plans.

3.4 ICASA only appended one condition by way of later erratum to the Draft ITA, viz. a rollout programme that it proposes to apply to the successful bidders for the licences for the spectrum in the 800 MHz and 2.6 GHz bands[10]. The amended Draft ITA states as follows:

"8. **ROLLOUT TARGETS**

8.1 The rollout target and obligation on successful licensees are as follows:

8.1.1 Package 1 will be 70% geographic coverage in 5 years of which 50% must exclude Gauteng, Cape Town and Durban metros.

8.1.2 Package 2 and 3 will be 50% population coverage in four years."

[8] http://www.ictregulationtoolkit.org/en/Section.1196.html

[9] http://www.ictregulationtoolkit.org/en/Section.1195.html

[10] Gazette 34961 of 23 January 2012.

3.4.1 Cell C firstly notes with regard to the above that these are ambitious targets, especially with regard to any "new entrants". It is also highly unlikely that such can be met in an economically feasible manner. The consequence of this is that the successful licensee may need to increase its retail costs accordingly, such that ICASA's objective of "broadband for all citizens" is thwarted. In any event, the value of package 1 cannot be determined until the Wholesale Open Access model has been clarified by ICASA.

3.4.3 The winners of the other two packages are required to achieve a target according to a different measurement. The difference has not been justified within the Draft ITA. We can assume that "population coverage" might mean that major centres must be covered by the "new entrant", and that as a new entrant, ICASA does not intend to burden it with additional obligations such as the Wholesale Open Access conditions, but investors and prospective applicants cannot rely on assumptions.

3.4.4 Finally, in relation to coverage and rollout, we note that ICASA requires site co-ordinates for the planned network under paragraph 7.3 of Appendix E. At the submission stage, it will be difficult to determine exactly what these might be (i) without knowing more about the licence conditions, and (ii) within the time frame provided for in the Draft ITA. A fully fledged rollout plan should take months to develop thoroughly and carefully.

3.5 The following statements by ICASA only serve to raise more questions as they reflect further inconsistencies within the ITA:

3.5.1 The Draft Plan states at paragraph 5.1 that ICASA intends to allow "as many entities as possible" to access the (available) spectrum and has considered sharing. It is not firstly clear why ICASA proposes to use regulatory mechanisms to increase competition rather than allowing market forces to prevail. Furthermore, ICASA refers to a Wholesale Open Access model as well as a Managed Spectrum Part model in respect of sharing. Neither model has been defined with sufficient clarity in the Draft Plan or anywhere in the Draft ITA. To highlight this point, with regard to the proposed Managed Spectrum Park model, the Draft Plan states at paragraph 5.8 that this model is to be implemented "according to some regulations and/or agreed procedures". Spectrum sharing is anticipated in the Radio Frequency Spectrum Regulations, 2011, at regulations 13 and 16, but with no reference to either the proposed Wholesale Open Access model or the proposed Managed Spectrum Park model. Cell C made a similar point in response to the draft radio frequency spectrum regulations.[11] The ITA needs to apply proper spectrum management principles in order to be successful.

3.5.2 At paragraph 5.2 of the Draft Plan, ICASA notes that it has considered introducing a Wholesale Open Access model and at paragraph 5.7 ICASA states that it may oblige successful licensees with regard to both the 800 MHz and 2.6 GHz bands to operate an Open Access network. There is an extremely limited definition of a Wholesale Open Access model at paragraphs 5.3 to 5.6 of the Draft ITA, whereas the proposed Open Access Network has not been not defined anywhere in the Draft ITA or Draft Plan. To illustrate the problem with using terms such as these without proper explanation, we have researched the term "Wholesale Open Access" ourselves and come up with a variety of options, any one of which or none of which might be the one that ICASA is thinking of:

[11] Pages 5, 6, 10, 11 and 18 of Cell C's submission on the draft Radio Frequency Spectrum Regulations of November 2010.

(a) In ICASA's local loop unbundling discussion document of July 2011[12], ICASA uses the term "open access". However, although ICASA states at paragraph 3.2.2 of such discussion document that the ECA "introduces an open access regime by introducing the obligation to interconnect and to lease electronic communication facilities", ICASA rightly differentiates the South African regulatory regime in this regard from regulatory regimes in other countries. In any event, to term the interconnection or facilities-leasing regulatory regime in South Africa a full "open access" regime is not correct – these are just two aspects of the local regulatory regime which in this instance are limited to unbundling and access to facilities. It does not refer to spectrum.

(b) In the context of undersea cables, the World Bank amongst others[13] has developed an open access concept which has begun to take on a more social or universal service-type meaning. In order to extend the benefits of broadband and high speed access, cable landings are undertaken in countries with open access regimes or where they are committed to developing such a regime. This includes full interconnection and facilities-leasing regulations, a competition framework for determining market power and imposing obligations on operators with control over essential facilities (such as cable landing stations), and in some cases, mandatory connection by the landing station operator on non-discriminatory terms.

(c) The ITU describes "open access" in an article dated September 2011[14], as '"the possibility for third parties to use an existing network infrastructure" according to the Best Practice Guidelines for Enabling Open Access, adopted by the 2010 Global Symposium for Regulators. Other definitions exist, each implying a different extent of openness. But there seems to be agreement that open access applies to infrastructure, and means that all suppliers are able to obtain access to network facilities on equal terms. The regulatory model and the conditions of access will vary, but open access is paramount if the new digital economy is not to fall back into monopoly'.

(d) In the Israeli jurisdiction, an Open Access Network is stated as referred to "a horizontally layered network architecture and business model that separates the physical access of the network from the actual service provisioning". Such a model would enable licensees to offer a virtual access network to alternative service providers, utilizing a wholesale business approach[15].

(e) In the Ofcom documents we have considered[16], we note that although there is no definition within that document for "wholesale open access", the document builds on other processes and documents that have preceded it in relation to "wholesale broadband access", "wholesale local access" and "open access" in the context of structural separation. In the referenced document, the term is used in the context of another important term, namely "national wholesaler":

[12] *Gazette* 34382 of 22 June 2011.

[13] Please see, for example, http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/Pict_Home/OPEN%20ACCESS%20-%20IIIrd%20ORDINARY%20SESSION%20of%20the%20AFRICAN%20UNION.pdf.

[14] "Open access regulation in the digital economy", ITU, September 2011, http://www.itu.int/net/itunews/issues/2011/07/43.aspx

[15] http://www.ecitele.com/OurOffering/Industries/Solutions/Pages/Open-Access.aspx.

[16] "Consultation on assessment of future mobile competition and proposals for the award of 800MHz and 2.6GHz spectrum and related issues", Ofcom, 22 March 2011.

"We therefore prefer the term "national wholesaler" for the purposes of the competition assessment. By national wholesaler we mean a company that provides wholesale access for the supply of mobile services at a national level. This *wholesale access service* could be provided to the national wholesaler's own retail business only, or also to other retailers. It is possible for there to be fewer national radio access networks than there are national wholesalers because wholesalers may seek to share networks. The term national wholesaler allows us to recognise this more clearly. Everything Everywhere, H3G, O2 and Vodafone, are currently the only national wholesalers in the UK. Sections 2 and 4 of Annex 6 provide further details. "

3.6 Furthermore, the Draft Plan suggests in paragraph 5.9 that prospective applicants who do not already have IMT spectrum will be able to use this spectrum "exclusively" or will be awarded some sort of reserved band. This is at odds with the statement made by ICASA in paragraph 5.1 of the Draft Plan that it wishes to admit "as many entities as possible" (supposedly to increase competition). Cell C is also concerned that reserving spectrum for entities which do not already have spectrum in the IMT bands may have a poor outcome – those entities are not likely to be able to afford to roll out networks in under-served or rural areas and so to meet the rollout targets. In addition, ICASA does not specify what will happen if no one applies for this "reserved" spectrum during the ITA process. ICASA has not given any explanation or reasoning behind its decision to reserve spectrum in this way. Cell C does not support the reservations proposed and it is also important to note that the Radio Frequency Spectrum Regulations, 2011, do not anticipate or provide for this sort of activity.

3.7 Cell C notes that the following issues are similarly vague. At paragraph 5.12 of the Draft Plan, ICASA proposes that entities which currently have access to the 3.5GHz band must surrender it before they can participate in this process, unless they can present a "compelling case" why they should be allowed to retain it. There is no reason given why Neotel and Sentech were then not required to give up their current spectrum allocation or present a compelling case for retaining such allocation. In fact, and as shall be elaborated in section 4 of this submission below, it appears that what is actually proposed in paragraph 8 of the Draft Plan is spectrum award to such entities rather than any form of migration. It would needless to say be highly irregular and legally challengeable for Neotel and Sentech to be presented spectrum in high demand in this manner. In any event, with regard to paragraph 5.12 of the Draft Plan, ICASA does not indicate what factors might be considered to make a case compelling. In the invitation to apply issued by ICASA in 2010[17], ICASA noted that applicants with spectrum in the band that was being made available could apply for additional spectrum up to the maximum available. Cell C is unclear as to why this approach has not been followed in the Draft ITA.

3.9 Cell C is studying the current process that Ofcom is developing in the United Kingdom (UK) in relation to the same bands[18]. Cell C is not suggesting that it is appropriate or necessary for ICASA to issue similarly lengthy documents, but it certainly assists in understanding the process proposed and the reasoning behind it when there is more information included in a consultation document than less. For example, Ofcom has now decided that the process is not likely to be successful in that it is not likely to achieve the goals that Ofcom has set and that the UK government has set for broadband rollout, especially with regard to under-served areas. Having regard to the goals, objectives and process set out by Ofcom in the consultation document, it is relatively easy to understand why it has come to this conclusion.

[17] *Gazette* 33246 of 28 May 2010.

[18] "Consultation on assessment of future mobile competition and proposals for the award of 800MHz and 2.6GHz spectrum and related issues", Ofcom, 22 March 2011, www.ofcom.org.uk

3.10 Cell C does not understand the meaning of paragraph 1.40 of the Draft ITA which refers to "early release" of bands "by providing an incentive and or mechanism [to] form part of the licence condition". If the licence conditions could be published in full, this would enable us to comment more meaningfully and also to determine with greater certainty whether this is a risk factor or not when deciding whether to participate in the licensing process.

3.11 Finally, the Draft Plan at paragraph 9.5 seems to stipulate that the bands to be awarded may only be used for certain purposes, namely broadband services. ICASA appears to be mandating what services can be provided on different bands of spectrum. Whilst the ITU prescribes certain bands for certain uses, the ICASA position seems to suggest that only this band can be used for broadband services, and not for example, the 900 MHz band. Cell C would like to understand why the technology and service-neutral approach to licensing that is foreseen in the ECA is not being adopted in relation to these bands.

4. Additional and specific comments

4.1 We have mentioned above our difficulties with the Draft Plan and Draft ITA in that many important terms are not defined or explained, or done so with insufficient clarity, the effect of which is to raise rather than answer any questions.

4.2 Cell C would also like to note a number of concerns in relation to Neotel and Sentech:

4.2.1 Incumbents of the bands proposed to be the subject of the Draft ITA are to be "migrated" according to a non-public consultation process referred to in paragraph 8.2 of the Draft Plan. Two-thirds of the existing 800 MHz band proposed to be awarded under the Draft ITA will be awarded to these two operators. The implications of this have a significant effect on the public interest. A process as important as this one which has implications for the use and allocation of a scarce national resource ought not to have been conducted with the operators only, but on an inclusive and public basis.

4.2.2 In addition, as we mention in section 2 of this submission, the Minister has to be consulted in relation to the migration of users under the stated provisions of section 34 and we are not aware that this has taken place.

4.2.3 Furthermore, as we mention in section 3 of this submission, it is possible to construe that what is actually being proposed with regard to Neotel and Sentech in the Draft Plan is an award rather than migration of spectrum in high demand.

4.2.4 ICASA proposes in the Draft Plan that Sentech should be allocated spectrum on "Wholesale Open Access conditions". However there are no similar conditions proposed to apply to Neotel or even WBS. Cell C is unclear why these entities would be treated differently. This is particularly concerning when both Neotel and Sentech appear to have been favourably treated in relation to the "migration" of their bands, by the inclusion of 800 MHz spectrum in the assignments proposed to each of them. Arguably this is more valuable than the 2.6GHz band, because it affords the licensee the ability to cover the same area with fewer base stations and therefore at lower capital expenditure.

4.3 We have already commented on the exclusivity proposed in relation to spectrum, in paragraph 5.9 of the Draft Plan. We repeat our concern here that the Draft ITA is silent as to what the next steps will be if no bidder can be found for such reserved spectrum, or if bidders do not meet the pre-qualification criteria. This leads to uncertainty for bidders and may well result in less interest from potential applicants.

4.4 In paragraph 7.2 of the Draft Plan, we note that ICASA seeks to license the800 MHz band ahead of the completion of the digital migration process (and in the absence of the final digital migration regulations). Cell C also notes in paragraph 4.1 of the Draft ITA that any licence that may be awarded is valid only for a period of one year as from date of award, and that in such year, licensees will be required to commence operations. These two dates and times are unworkable having regard to the final switch off date for digital migration which remains uncertain. The licence term should also take account of the period that will be needed by licensees to recoup the cost of their investment. As such, Cell C proposes that the spectrum licence awarded should be valid for the same period of time as the ECNS licence it is granted under If, as ICASA suggests, the licence duration should be (after year one) 15 years, then it is foreseeable that a licensee whose ECNS licence expires in 2020 will only receive an 8-year licence. This has an obvious and negative impact on valuation, rollout plans and likely investment.

4.5 We intend to submit comments on the Draft Policy Directions to the Minister. In those comments, we have noted that the 800 MHz band is a valuable band and that it might in fact be more beneficial to the sector if ICASA were to ensure that the largest possible amount of spectrum is open to the largest possible number of operators (without over-subscribing the band), to enable the market to determine those placing the highest value on and thereby ensuring the most efficient use of, the spectrum. If bidders were eligible for 2x30 MHz of 800 MHz spectrum for example, Cell C considers that the ITA would be more attractive to bidders and their investors.

4.6 In paragraph 1 of the Draft ITA, ICASA appears to default to an auction process if the allocation of spectrum by way of beauty context or pre-qualification is not successful. Cell C has a number of concerns about this:

4.6.1 The National Radio Frequency Policy and Policy Directions[19] state that auctions should only be used as a last resort and that spectrum should always be allocated in the public interest, with regard to the needs of users and resources of new entrants, among other things. The Draft ITA does not indicate how ICASA has taken account of these matters in proposing the sealed bid phase, which is tantamount to an auction because the same sort of considerations are present in determining the amount to include in the sealed bid, as in determining an amount to offer on auction, particularly as the sealed bid process could continue past a first round and the process thereafter is not specified.

4.6.2 It is highly unusual to submit a sealed bid at the same time as participating in a beauty contest, as required by 1.17 of the Draft ITA. We are not aware of this approach being taken in any other jurisdiction and would be pleased to understand the reasoning for this.

4.6.3 Cell C does not recommend an auction process without further information about how it might work. Auctions, in general, can be limiting in relation to transformation of the industry. As Cell C mentioned in its submission on the draft radio frequency spectrum regulations in November 2010[20], we are concerned that auctions in Europe have realised varying prices and only in some cases have resulted in the introduction of new entrants.

4.6.4 A more detailed study should, in our view, take place before determining the methodology of awarding scarce resources in these valuable bands.

[19] Gazette 33119 of 16 April 2010.

[20] Sections 3.5 and 3.6 of that submission.

4.8 The Draft ITA does not set out whether or not bidders may associate. Given that ICASA does envisage that spectrum licensees might share spectrum within a Managed Spectrum Park, whatever that is, it may well make sense to bid in consortium. ICASA is requested to clarify this point. This will require clarification of what is meant by the term "affiliate" as this is used in paragraph 7.1.1 of the Draft ITA.

4.9 Cell C notes that the invitation to apply that has recently been published inviting applications for subscription broadcasting licences affords potential applicants a period of over 5 months within which they can consider and prepare their applications[21]. The period envisaged in the Draft ITA in this process is shorter while requiring licensees to do more. The spectrum for electronic communications applications in this instance is in "high demand". There are accordingly many more considerations for potential applicants given the likely value. Cell C would appreciate insight into the reason for the short timetable, particularly given that the digital migration switch-off date is still years away.

5. Recommendations

5.1 In our view, the weight of issues that would benefit from clarification is so great, and the risk of legal challenge so real, that it makes sense for ICASA to withdraw the Draft Plan and Draft ITA and wait for the Minister to finalise the Draft Policy Directions.

5.2 In the time that this takes, additional input could be sought from industry and independent experts including by way of a public workshop, on the need for and potential value of, the licences proposed for mobile broadband wireless access. We could then also consider the extent to which the Radio Frequency Spectrum Regulations, 2011, already deal with the issues raised in the ITA.

5.3 Cell C would be very pleased to participate in such a process.

29 February 2012

[21] Gazette 34999 of 2 February 2012.

Appendix 1: Legal texts in order of reference

The Constitution

40. Government of the Republic

1. In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.
2. All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

41. Principles of co-operative government and intergovernmental relations

1. All spheres of government and all organs of state within each sphere must
    a. preserve the peace, national unity and the indivisibility of the Republic;
    b. secure the well-being of the people of the Republic;
    c. provide effective, transparent, accountable and coherent government for the Republic as a whole;
    d. be loyal to the Constitution, the Republic and its people;
    e. respect the constitutional status, institutions, powers and functions of government in the other spheres;
    f. not assume any power or function except those conferred on them in terms of the Constitution;
    g. exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
    h. co-operate with one another in mutual trust and good faith by
        i. fostering friendly relations;
        ii. assisting and supporting one another;
        iii. informing one another of, and consulting one another on, matters of common interest;
        iv. co-ordinating their actions and legislation with one another;
        v. adhering to agreed procedures; and
        vi. avoiding legal proceedings against one another.

2. An Act of Parliament must
    a. establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
    b. provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

3. An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

4. If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

33. Just administrative action

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must
    a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
    b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
    c. promote an efficient administration.

<u>**The ICASA Act**</u>

Section 4B permits ICASA to conduct an inquiry into any matter with regard to:

(a) The achievement of the objects of this Act or the underlying statutes;

(b) Regulations and guidelines made in terms of this Act or the underlying statutes;

(c) Compliance by applicable persons with this Act and the underlying statutes;

(d) Compliance with the terms and conditions of any licence by the holder of such licence issued pursuant to the underlying statutes; and

(e) The exercise and performance of its powers, functions and duties in terms of this Act or the underlying statutes.

Appendix 2: Table of summary of the powers of the Minister and ICASA

Subject matter	Powers and duties of the Minister	Powers and duties of ICASA
The primary object of the ECA is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to: • Promote...encourage...ensure...develop... protect....facilitate...harmonise...refrain from...various things, (a)-(i), (k)-(z) • Provide a clear allocation of roles and assignment of tasks between policy formulation and regulation within the ICT sector, (j)		
Policy	• The Minister may make policies on matters of national policy applicable to the ICT sector, consistent with the objects of the Act and related legislation; in relation to spectrum, universal service, SA's international obligations, new technologies, guidelines for ICASA in determining licence fees and incentives where an applicant makes binding commitments to construct networks and provide services in under-serviced areas, the participation of SMME's in the ICT sector, control and role of SOEs, and any other policy which may be necessary for the application of this Act or the related legislation • The Minister may give policy directions to ICASA consistent with the objects of the Act and related legislation, relating to- (a) undertaking of inquiries and submission of reports on them to the Minister (b) determining priorities for development of networks and services (c) matters within ICASA's jurisdiction placed before the Minister for urgent consideration (d) when issuing a policy direction the Minister *must* consult ICASA and publish a proposed policy direction for comment (e) policy directions can be amended, withdrawn or substituted by the Minister	• ICASA must, in exercising its powers and performing its duties under this Act and the related legislation, consider policies made by the Minister under s3 • ICASA may make recommendations to the Minister on policy matters in accordance with the objects of the EC Act • ICASA may make regulations in the same way as it is authorised to do under s4 of the ICASA Act, s4
Spectrum	• The Minister must approve the national frequency plan developed by ICASA, s34 • The Minister must consult with ICASA regarding security service use of spectrum, and government's planned and current uses, including migration, s34 • The Minister represents the Republic in international matters in respect of international allotment of spectrum and international co-ordination of spectrum usage, s34	• ICASA controls, plans, administers and manages use and licensing of spectrum including investigating and resolving harmful interference where reported, withdrawing licences, and prescribing co-ordination activities s30-33 (except where s34 applies) • ICASA may prescribe procedures and criteria for awarding radio licences for competing applications or where spectrum is scarce, and may prescribe apparatus or recommend migration, s31, 34 • ICASA must take account of the Minister's requirements and government usage, s34