

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

CASE NO 2018/20057

PH NO 342

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 NETWORKS (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

("the main application")

And the matter between:

MOBILE TELEPHONE NETWORKS (PTY) LTD

Applicant

and

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Fourteenth Respondent

("the counter application")

FILING NOTICE

TAKE NOTICE THAT the Ninth Respondent in the main application and Applicant in the counter-application presents the following document for service and filing:

1. MTN's Supplementary Founding Affidavit in Part B of MTN's Counter-Application, dated 22 August 2018.

Dated at Johannesburg on

2018



WEBBER WENTZEL

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and Applicant's attorneys in the counter application

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To:

The Registrar

High Court of South Africa

Gauteng Local Division, Johannesburg

And to:

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("the main application")



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TELKOM SOC SA LTD

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("the counter-application")

**SUPPLEMENTARY FOUNDING AFFIDAVIT IN PART B OF MTN'S COUNTER-
APPLICATION**

I, the undersigned

WILLIAM GRAHAM DE VRIES

state under oath as follows:

- 1 I am the Corporate Services Executive of the applicant in the counter-application, Mobile Telephone Networks Proprietary Limited ("**MTN**").
- 2 I am the deponent to the founding affidavit in the counter-application and remain authorised to represent MTN in these proceedings and to depose to this supplementary founding affidavit on its behalf.
- 3 The facts contained in this affidavit are both true and correct, and within my personal knowledge unless the context indicates otherwise.

THE PURPOSE OF THIS AFFIDAVIT

- 4 On 21 June 2018, MTN filed a two-part counter-application:
 - 4.1 In Part A, MTN seeks an order suspending the operation of the End-User and Subscriber Service Charter Amendment Regulations (the "**Amendment Regulations**"), *alternatively* directing the Independent Communications Authority of South Africa ("**ICASA**") to do so, *further alternatively* interdicting and restraining ICASA from taking steps to implement or enforce the Amendment Regulations.



- 4.2 In Part B, MTN seeks final relief in the form of an order declaring clause 8 of the Amendment Regulations invalid and reviewing and setting aside the decision of ICASA to make clause 8.
- 5 In Part B of the counter-application, ICASA was called upon, in terms of Uniform Rule 53(1)(b), to deliver the record of proceedings sought to be set aside (the "**Record**") within 15 days of receipt of the notice of counter-application.
- 6 ICASA delivered a copy of the Record on 8 August 2018.
- 7 The purpose of this affidavit is, in terms of Uniform Rule 53(4), to supplement MTN's founding affidavit in relation to the final relief sought in Part B of the counter-application.
- 8 MTN stands by all of the review grounds in its founding affidavit. I am advised and respectfully submit that each of those review grounds is strengthened by the contents of the Record. The reasons for this are set out below.
- 9 This supplementary founding affidavit is structured as follows:
- 9.1 First, I explain that the Record confirms ICASA's failure to comply with the mandatory and material condition prescribed by section 4(5) of the Electronic Communications Act 36 of 2005 ("**the ECA**").
- 9.2 Second, I illustrate that, based on the submissions of stakeholders on the various draft versions of the Amendment Regulations, ICASA was



aware that licensees would be unable to comply with the Amendment Regulations within the one-month period provided for in clause 8 of the Amendment Regulations. This compounds the irrationality, unreasonableness and unlawfulness of ICASA's decision to make clause 8.

ICASA'S NON-COMPLIANCE WITH SECTION 4(5) OF THE ECA

10 Section 4(5) of the ECA provides that:

"The Authority must, not less than 30 days prior to making regulations, inform the Minister in writing of its intention and provide the Minister with a copy of the proposed regulations."

11 In its founding affidavit (at paragraph 93), MTN called upon ICASA to provide written evidence of its compliance with section 4(5), failing which it would contend that the Amendment Regulations should be set aside on the basis that a mandatory and material condition was not complied with.

12 Included in the Record is a memorandum dated 2 August 2017, which I attach marked "**GDV11**", in which ICASA wrote to the Minister informing her of the proposed amendments to the End-User and Subscriber Service Charter Regulations, 2016 ("**the Charter Regulations**"). Attached as Appendix B to the memorandum is a document titled "*Proposed Draft Amendments*", which describes the proposed amendments as they stood at the time.



- 13 ICASA attached the same memorandum and appendix to its answering affidavit in Part A, in response to paragraph 93 of MTN's founding affidavit.
- 14 Self-evidently, section 4(5) requires ICASA to inform the Minister of its intention to make final regulations, and to provide the Minister with a copy of those final regulations, not less than 30 days before they are made.
- 15 However, after "GDV11" was sent to the Minister, two further rounds of consultation were held and three further versions of the Amendment Regulations were published:
- 15.1 On 7 August 2017, draft regulations (the "**First Draft Regulations**") were published for comment. They differed from the Proposed Draft Amendments sent to the Minister, in that the latter did not contain proposed consumer education and awareness provisions.
- 15.2 On 17 November 2017, a second set of draft regulations (the "**Second Draft Regulations**") was published for comment. They differed markedly from both the First Draft Regulations and the Proposed Draft Amendments sent to the Minister.
- 15.3 On 7 May 2018, ICASA published the final Amendment Regulations.
- 16 Section 4(5) required ICASA, not less than 30 days before 7 May 2018, to inform the Minister in writing of its intention to make the Amendment Regulations and to provide a copy to the Minister. The Record demonstrates that ICASA failed to do so. At most, ICASA informed the Minister of its

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intention to amend the Charter Regulations by way of the Proposed Draft Amendments, which bear little resemblance to the Amendment Regulations in their final form.

- 17 ICASA has thus failed to comply with section 4(5). The Record confirms that the Amendment Regulations are irregular, because a mandatory and material condition was not complied with within the meaning of section 6(2)(b) of PAJA, or under the principle of legality.

THE IRRATIONALITY, UNREASONABLENESS AND UNCONSTITUTIONALITY OF CLAUSE 8 OF THE AMENDMENT REGULATIONS

The proper approach to the rationality and reasonableness of Clause 8

- 18 In MTN's founding affidavit, I explained that ICASA's decision to require licensees to comply with the Amendment Regulations within one month is irrational, unreasonable, failed to take into account relevant considerations, and is in violation of section 22 of the Constitution.
- 19 In its answering affidavit in Part A, ICASA adopts a position that is unsustainable as a matter of law. In short, ICASA claims that, had MTN informed it prior to the publication of the Amendment Regulations of the complexity of compliance, it would have provided for a longer lead-in time and would have provided licensees with a later implementation date by which to comply.



- 20 I am advised and respectfully submit that, once ICASA admits (as it has) that the decision to allow one month for implementation was, objectively speaking, unreasonable, that is the end of the matter. I am furthermore advised that the irrationality, unreasonableness and unconstitutionality of a decision cannot depend on whether ICASA subjectively believed that its decision was rational and reasonable, based on the information that MTN had provided to it.
- 21 MTN submits that these are objective requirements. And, viewed objectively, ICASA's decision was plainly irrational, unreasonable and unconstitutional.
- 22 However, the contents of the Record demonstrate that, even if ICASA's position were sustainable as a matter of law (which it is not), it is in any event unsustainable on the facts. That is because, having regard to the various submissions received from stakeholders, ICASA was aware of the considerable difficulties that licensees would have complying with the Amendment Regulations. I elaborate on the reasons for this below.

Stakeholder submissions relevant to the complexity of compliance

- 23 Numerous stakeholders made detailed submissions in response to the publication of various draft iterations of the Amendment Regulations. While many of these submissions addressed the lawfulness of the requirements that ICASA sought to impose, stakeholders repeatedly warned that these requirements would take time and resources to implement.

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24 In order not to overburden the papers, I do not attach the full stakeholder submissions to this affidavit. Instead, I attach only those extracts from the Record containing the submissions to which I refer. However, the full Record will be available at the hearing of the matter to the extent that it is required.

25 In response to the First Draft Regulations, which provided for a commencement date immediately upon publication:

25.1 MWEB explained that, when faced with new regulations, a licensee is required to consider, *inter alia*, business processes and practicality, and that this includes the costs of implementing changes balanced against what the regulations set out to achieve. I attach the relevant extract of MWEB's submission marked "**GDV12**".

25.2 Cell C noted that ICASA's failure to conduct a regulatory impact assessment meant that it had failed to recognise the technical and financial issues that licensees would face. I attach the relevant extract of Cell C's submission marked "**GDV13**".

25.3 Telkom explained that it was not technically possible for it to implement percentage-based voice and SMS notification functionality on its network, and that extending data expiry periods would disrupt its network configuration and would result in an increase in cost, because additional network resources would have to be provisioned. I attach the relevant extracts of Telkom's submission marked "**GDV14**".

25.4 Vodacom explained that the requirement to suspend data services unless consent had been given would be technically and practically

Two handwritten signatures in black ink are located in the bottom right corner of the page. The first signature is a stylized, cursive 'M' or 'W' shape. The second signature is a more fluid, cursive signature that appears to be 'A.G.' or similar.

difficult to meet, and that the proposed out-of-bundle billing practices would require contracted terms and conditions to be reviewed and changed. I attach the relevant extracts of Vodacom's submission marked "**GDV15**".

25.5 The South African Communications Forum ("**SACF**") suggested that ICASA conduct a regulatory impact assessment in order to understand the compliance costs faced by licensees. It also explained that the regulations would "*require systems development which would need time and adds to the cost of compliance*". It thus called on ICASA to "*provide for the necessary time for systems development and allow for the delayed implementation thereof*". I attach the relevant extracts of SACF's submission marked "**GDV16**".

26 In response to the Second Draft Regulations (which, notwithstanding the foregoing comments, persisted with a commencement date immediately upon publication):

26.1 Cell C informed ICASA that the provisioning of additional network capacity would be "*close to impossible*" if consumers could carry over data bundles for three-year periods, and would require licensees to overhaul existing Generally Accepted Accounting Principles (GAAP) and International Financial Reporting Standards (IFRS) approved methods of recording data vouchers sold. Network provisioning problems would also arise in relation to the rolling over of unused data for post-paid users. I attach the relevant extracts of Cell C's submission marked "**GDV17**".

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26.2 Telkom explained in its submissions (which I attach marked “**GDV18**”) that:

26.2.1 ICASA's proposed method of voice, SMS and data notification would impact each product bundle offering, and require that Telkom reconfigure its systems;

26.2.2 extending data expiry periods to three years would “*disrupt the current configuration of the network*”, resulting in “*an increase in costs due to the need for additional network resources which will have to be provisioned to support the Authority's new proposal*”; and

26.2.3 in order to facilitate the proposed rollover and transfer of unused data, Telkom would be required to implement a selection process allowing subscribers to transfer a multitude of different types of package to another subscriber, which would be a “*complicated and costly*” exercise.

26.3 Vodacom explained in its submissions (which I attach marked “**GDV19**”) that:

26.3.1 certain bundle types (including voice and SMS bundles supplied on a “*corporate wide*” basis) are not monitored in real time, rendering it, on Vodacom's existing systems, technically impossible to facilitate the option notification and obtain consent at the time of depletion of such services;

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26.3.2 given the manner in which concurrent quota reservations are managed, it would not be possible to assess the point of depletion of a data bundle in real time;

26.3.3 it would not be technically feasible for Vodacom to present end-users with the proposed out-of-bundle billing requirements on a "*per bundle basis*"; and

26.3.4 most importantly, on the issue of the commencement date, Vodacom expressly stated that:

"In the event that the Authority wishes to promulgate the proposed amendments, licensees should be given sufficient time (at least 6 months) to develop systems in order to comply with the regulations from the date of publication." (My underlining).

26.4 The Wireless Access Providers' Association of South Africa ("**WAPA**") recommended that the final regulations implement a "*phasing-in timeline rather than come into operation on the date of publication*", in order to "*ensure that licensees understand the new Regulations and can comply with the provisions contained therein*". I attach the relevant extract of WAPA's submission marked "**GDV20**".

27 During the public hearings held on 1 and 2 March 2018:

27.1 Vodacom reiterated in its presentation that it is not always technically feasible to provide end-users with an option to buy additional data

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bundles, with an option to opt-in or out of being charged out of bundle rates, or to obtain consent being charged out of bundle rates upon depletion of every data bundle. I attach the relevant extracts of Vodacom's presentation marked "**GDV21**".

27.2 Telkom explained in its presentation, the relevant extracts of which I attach marked "**GDV22**", that:

27.2.1 changing to percentages for purposes of depletion notifications would require Telkom to "*reconfigure all systems and products*";

27.2.2 enforcing a minimum data expiry period of three years would disrupt the current configuration of the network; and

27.2.3 enabling transfer of data between different types of bundles is complex, and enforcing such a requirement would be technically and financially challenging.

28 In the supplementary submissions made subsequent to the public hearings, between 8 and 13 March 2018, the following was drawn to ICASA's attention:

28.1 Telkom explained in its presentation, the relevant extracts of which I attach marked "**GDV23**", that:

28.1.1 given that network engineers dimension the network based on product trending and usage consumption, extending the validity period of data bundles would make it difficult to understand when a product would be consumed. This would require the

Two handwritten signatures in black ink are located at the bottom right of the page. The first signature is a stylized 'DM' and the second is a more complex, cursive signature.

building of networks to cater for exceptionally high demand on network resources closer to the expiry date; and

28.1.2 data rollover on legacy products would have to be managed, requiring additional network resources and increasing overall costs.

28.2 Cell C explained that network capacity cannot be stored, and that requiring licensees to provide end-users with indefinite access rights to data services would affect a licensee's technical and operational configuration and cause financial prejudice. I attach the relevant extracts of Cell C's submission marked "**GDV24**".

29 The Record therefore makes it plain that ICASA was repeatedly alerted to the fact that licensees would need to overcome technical, practical and financial challenges in order to comply with any amendments to the Charter Regulations. It was, of course, impossible for stakeholders to provide submissions any more detailed than those provided, because the regulations were only in draft form, the precise challenges changed with each iteration of the regulations, and licensees had not completed the process of determining how to comply.

30 Nevertheless, the submissions amply demonstrate that ICASA cannot complain that it was not forewarned that licensees would have considerable difficulty complying.

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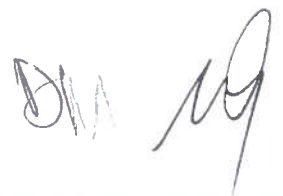
MTN's review grounds are bolstered by the Record

31 As explained at the outset, MTN contends that ICASA's decision to impose a one-month period for compliance was objectively irrational and unreasonable. But in any event, the stakeholder submissions detailed in the section above demonstrate that ICASA was subjectively aware that a one-month period for compliance was unfeasible. The stakeholder submissions accordingly bolster each of MTN's review grounds, as I explain below.

32 First, the stakeholder submissions demonstrate that ICASA's decision was irrational:

32.1 According to ICASA's Reasons document (attached to the founding affidavit marked "**GDV5**"), ICASA's explanation for introducing the one-month commencement date was that it agreed with WAPA's submission and had "*amended this regulation accordingly*". But the WAPA submission recommended a phased approach, and made no mention whatsoever of a one-month implementation period.

32.2 Indeed, conspicuously absent from the Record is any stakeholder submission motivating for a one-month commencement date, or any document that explains how or why ICASA arrived at its decision to limit the period for compliance to one month. No stakeholder, including those who made submissions in the interests and on behalf of consumers, motivated for such a commencement date.

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- 32.3 The first mention of the one-month timeframe occurs in the minutes of an ICASA special council meeting on 26 April 2018, which I attach marked “**GDV25**”, and in which it was recorded that the *"implementation date will be one month after the publication date"*. The minutes do not reveal any basis for this decision.
- 32.4 There is simply no rational connection between ICASA’s decision and the material before it. It is also apparent that ICASA made no effort, despite the repeated calls for it to do so, to ascertain what a reasonable implementation period would be.
- 32.5 I accordingly submit that no rational justification is apparent from the Record for ICASA’s decision to impose a one-month implementation period for the Amendment Regulations. It appears to be nothing more than an arbitrary “*thumb-suck*”. ICASA’s decision is therefore reviewable in terms of section 6(2)(e)(vi) and section 6(2)(f)(ii) of PAJA and under the principle of legality.
- 33 Second, the stakeholder submissions demonstrate that ICASA’s decision is unreasonable:
- 33.1 Various less restrictive means to achieve the purpose of the Amendment Regulations were proffered by stakeholders. As numerous stakeholders explained, a delayed implementation period would have provided licensees with the time necessary to develop the systems necessary to ensure compliance with the Amendment Regulations.

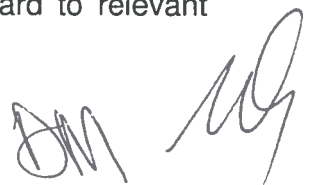
A handwritten signature in black ink, appearing to be 'DM' followed by a stylized flourish.

- 33.2 In addition, both Cell C and the SACF suggested that ICASA conduct a regulatory impact assessment prior to making clause 8 of the Amendment Regulations in order to understand the costs and complexity of compliance. Of course, as explained in the founding affidavit, MTN suggested that ICASA should consult widely specifically on the issue of a commencement date.
- 33.3 Without reason, ICASA elected to adopt none of these paths.
- 33.4 In light of the above, I reiterate that ICASA's decision to make clause 8 of the Amendment Regulations is reviewable in terms of section 6(2)(h) of PAJA on the basis that it was unreasonable.
- 34 Third, the stakeholder submissions demonstrate that, in making clause 8, ICASA failed to take into account relevant considerations:
- 34.1 As explained above, numerous stakeholders alerted ICASA to the fact that licensees would face significant challenges in developing, implementing, and budgeting for system changes required for compliance with amendments to the Charter Regulations.
- 34.2 The Record, read together with the Reasons document, shows that ICASA failed to take into consideration these concerns.
- 34.3 Indeed, ICASA's attitude to concerns of this kind is encapsulated in its Explanatory Note for the Second Draft Regulations (the relevant extract of which I attach marked "GDV26"), where it dismissed Vodacom's technical and practical concerns by simply asserting that it was "*not*

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aware of technological or technical challenges that would prevent licensees to automatically prevent its subscribers from paying out-of-bundle rates without their consent once they deplete their data bundle".

- 34.4 The reason ICASA was “*not aware*” of such challenges is because it ignored proposals from Cell C and the SACF to conduct a regulatory impact assessment to identify them. In the same way, and as explained in the founding affidavit, ICASA ignored MTN’s suggestion to consult stakeholders specifically on the question of an appropriate commencement date.
- 34.5 The only stakeholder submission to which ICASA referred in its Reasons document in respect of clause 8 was the WAPA submission. However, WAPA suggested a phased approach and never proposed a one-month period for compliance.
- 34.6 In any event, numerous other stakeholders (including Cell C, Telkom, MTN, and Vodacom) made detailed submissions that showed one month would be unfeasible. These went ignored. Indeed, Vodacom’s specific suggestion of a six-month period within which to comply is not referred to in ICASA’s Reasons document at all.
- 34.7 ICASA thus clearly failed to take into consideration the concerns raised by stakeholders regarding the technical, practical and financial challenges of complying with amendments to the Charter Regulations when deciding to impose the one month compliance period. ICASA’s decision to make clause 8 is accordingly reviewable under section 6(2)(e)(iii) of PAJA, in that it failed to have regard to relevant

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considerations, and under the principle of legality, in that ignoring the stakeholder submissions coloured the entire process with irrationality and rendered ICASA's decision irrational.

35 Fourth, the stakeholder submissions demonstrate that ICASA's decision violated section 22 of the Constitution in that any law regulating "*the practice of a trade, occupation or profession*" must satisfy the test for rationality, and, for the reasons given above, the decision to make clause 8 is plainly irrational.

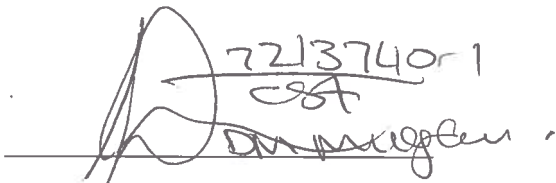
CONCLUSION

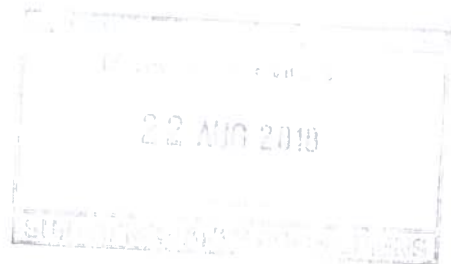
36 For the reasons set out above, MTN persists in the relief sought in the notice of counter-application.



WILLIAM GRAHAM DE VRIES

The Deponent has acknowledged that the Deponent knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at ^{Randburg} on 22, August 2018, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

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C8A




COMMISSIONER OF OATHS

EX OFFICIO: constable.

FULL NAMES: Doko Mugeen





Independent Communications Authority of South Africa
Pinmill Farm, 164 Katherine Street, Sandton
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Email: chairperson@icasa.org.za

Ref no: 11/1/1/2-2017

Minister Ayanda Dlodlo, MP

Minister of Communications
Tshedimosetso House
1035 cnr Frances Baard and Festival streets
HATFIELD, Pretoria
0083

Per email: nosizwe@doc.gov.za

Dear Honourable Minister,

RE: INITIATIVES ON THE REDUCTION OF COST TO COMMUNICATE

1. Your letter dated 27 July 2017, addressed to the Acting Chairperson has reference.
2. The Independent Communications Authority of South Africa (the Authority), has undertaken certain initiatives in an effort to ensure that all citizens have access to affordable, accessible and universal communications services in line with the call to reduce communications costs.

P Mashile, K Modimoeng, MR Mohlologa, BC Mokhele, PJ Zimri, (Councillors),
PK Pongwana (CEO)

1 | Page

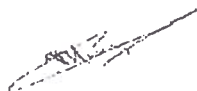
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3. The initiatives include the establishment of the task team between the Authority and the National Consumer Commission (NCC), and engagements with the respective licensees to address challenges that have been raised with regards to the business rules of mobile data services (particularly the business rules on expiry of unused data bundles and the differentials between in-and-out-of-bundle rates).
4. As a result of the above, and as per the Honourable Minister's request, Kindly find attached the Authority's report on the matter and the proposed draft amendments to the End-user and Subscriber Service Charter Regulations.

Yours sincerely,



Rubben Mohlaloga

Acting Chairperson

Date: 02 August 2017



Independent Communications Authority of South Africa
Pinmill Farm, 164 Katherine Street, Sandton
Private Bag X10002, Sandton, 2146

**THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH
AFRICA'S (ICASA) IMPLEMENTATION PLAN FOR THE DIRECTIVE
ON THE REDUCTION OF COST TO COMMUNICATE**

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1. BACKGROUND

- 1.1. In 2015 the general public raised a concern under the banner #DataMustFall (and later #SocialMediaBlackout) on social media over the perceived high cost of data services.
- 1.2. This resulted in the Parliamentary Portfolio Committee ("PPC") on Telecommunications and Postal Services holding an urgent two-day public hearing on the cost of data while also hearing submissions by civil society organisations, mobile operators, student representative organisations, the DTPS, CSIR, and others.
- 1.3. Based on the PPC recommendations the Authority initiated a process together with the National Consumer Commission ("NCC") to review amongst others, the data expiry rules as well as the charging of out of bundle rates and the impact thereof on customers.
- 1.4. In addition, the Minister of Telecommunication and Postal Services ("the Minister") issued a final "Policy direction on effective competition in broadband markets and the reduction of data costs" instructing the Authority to prioritise the commencement and conclusion an inquiry and the prescription of regulations as contemplated in section 67(4) of the Electronic Communications Act No. 36 of 2005 ("ECA") to ensure effective competition in broadband markets.
- 1.5. Minister further expressed his concerns in the 2017/2018FY budget vote about the slow progress of the Authority's priority market process and indicated that he is in discussion with Minister Ebrahim Patel, Department of Economic Development, to request the Competition Commission to conduct an inquiry into broadband markets.¹ The Minister of Communications, Minister Dlodlo also expressed concerns with

¹ <http://www.gov.za/speeches/minister-ebrahim-patel-economic-development-dept-budget-vote-201718-25-may-2017-0000>

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regards to the availability and affordability of communications services for all South Africans (particularly data).

- 1.6. Minister Patel indicated in the 2017/18 Budget Vote that, following the discussion with Minister Cwele, the Ministry will request the Competition Commission to conduct an inquiry into broadband markets in terms of section 43B(1) of the Competition Act, 1998.²
- 1.7. Therefore, the purpose of this report is to provide the Minister of Communications with ICASA's operational plan to respond to the directive and public and government concerns around the cost of data services. The Authority intends to mount a number of initiatives comprising short, medium and long term measures to effect changes to industry business rules, practices and pricing behaviour in response to the calls to reduce the cost to communicate.

2. CONFIDENTIALITY

- 2.1. The Authority requests that this submission (and all attachments hereto) be treated as confidential in terms of section 79B(3) of the ECA read with section 4D of the Independent Communications Authority of South Africa Act No. 13 of 2000, as amended ("ICASA Act") on the basis that the disclosure of the information – prior to the commencement of the public consultation processes for implementation of regulatory measures contemplated herein as contemplated in terms of section 4 of the ECA and sections 4, 4B and 4C of the ICASA Act – may amount to breach of administrative due process and place the Authority in an unfavourable position from a process compliance perspective.

² <http://www.gov.za/speeches/minister-ebrahim-patel-economic-development-dept-budget-vote-201718-25-may-2017-0000>

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3. PROGRAMME TO ADDRESS COST TO COMMUNICATE

- 3.1. In light of the above, the Authority's initiatives to address cost to communicate can be categorised as follows:

Short-term initiatives

- 3.1.1. These refer to initiatives that could be implemented in a period of six months or less.

ICASA / NCC Task Team assessment of mobile data services business rules

- 3.1.2. The Authority established a task team together with the National Consumer Commission ("NCC") to address challenges that have been raised with regards to the business rules of mobile data services (particularly the business rules on expiry of unused data bundles and the differentials between in-and-out-of-bundle rates).
- 3.1.3. It should be noted that the Task Team is guided by object 2(n) and (y) of the ECA as well as section 3 of the Consumer Protection Act, 2008 (the "CPA").
- 3.1.4. The task team engaged with the operators and subsequently recommended, amongst others, that Council should consider amending the End-user and Subscriber Service Charter Regulations to address concerns regarding expiry of unused data bundles and the differentials between in-and-out-of-bundle rates.
- 3.1.5. On 28 July 2017 Authority's Council resolved to approve the proposed amendment of the End-user and Subscriber Service Charter Regulations ("draft Regulations"). The amendment of the Regulations is to be directed at regulation 8(7) thereof and purports to minimise or remove harm to consumers due to

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unfairness of the current data bundles expiry rules and high out-of-bundle rates. The draft proposed Regulations are attached as Appendix "B" for ease of reference. The anticipated finalisation and effective date of the amendment is 31 December 2017.

International benchmark on mobile retail data tariffs

3.1.6. The Authority will also undertake a comprehensive international benchmark study on South African mobile retail data tariffs against comparator countries.

3.1.7. This study is guided by section 4(3)(h) of the ICASA Act. The objective of this report is to compare South African data bundles with other comparator countries to assess the level of competitiveness of South African data bundles.

3.1.8. This report is expected to address the concerns raised by the general public that the level of South African mobile data prices remains far more expensive compared to comparator countries.

3.1.9. This study will be an input into inform ICASA's ex-ante regulatory intervention into the data prices in line with international best practise. The study is expected to be completed by 30 November 2017.

Review of the 2014 Voice Wholesale Call Termination Regulations

3.1.10. The Authority is also undertaking the review of the 2014 voice Wholesale Call Termination Regulations in terms of section 67(8) of the ECA.

3.1.11. The review of the wholesale call termination regulations is intended to increase the effectiveness of competition in the wholesale call termination services markets. The review is expected to be completed by 30 September 2017.

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Medium-term initiatives

3.1.12. These refer to initiatives that can be implemented in a period of 12 months or less.

Market inquiry into the broadband services markets

3.1.13. The purpose of the proposed broadband market inquiry is to identify broadband markets or market segments susceptible to *ex ante* regulation and immediately conduct market reviews in respect of those markets.

3.1.14. The inquiry will be conducted in terms of section 4B read with section 67(4) of the ECA also to address the concerns raised by various stakeholders regarding data prices and to respond to the final policy direction by on effective competition in broadband markets and the reduction of data costs.

3.1.15. In conducting the market inquiry into broadband services markets, the Authority will implement the following steps:

- Step 1: publication of notice advising that an inquiry will be conducted in due course and commencing pre-inquiry preliminary information gathering e.g. publication of a questionnaire;
- Step 2: formal commencement of the inquiry in terms of section 4B of the ICASA Act in terms of a notice published in the *Government Gazette* and the publication of a discussion document for public comment (45 days minimum);

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- Step 3: publication of draft position paper for public comment (45 days minimum);
- Step 4: publication of a final position paper with draft Regulations (if warranted following the market inquiry) for public comment (30 days minimum);
- Step 5: publication of final Regulations.

Rapid Deployment Regulations

3.1.16. The Authority is engaging the Department of Telecommunications and Postal Services (the "DTPS") with regards to the policy directive on the rapid deployment of infrastructure as this has a direct and indirect impact on the cost to communicate. To this end, the Authority is part of the DTPS established Working Group to formulate the Terms of Reference for the Coordinating Committee on rapid deployment.

Long-term initiatives

3.1.17. These refer to initiatives that will take longer than twelve months to implement.

Priority Markets Inquiry

3.1.18. On the 30th of June 2017, the Authority published a notice of intention to conduct an inquiry in terms of section 4B of the ICASA Act to identify priority markets in the electronic communications sector.

3.1.19. The purpose of the inquiry is to identify markets that the Authority will prioritise for market reviews and potential regulation in terms of section 67(4) of the ECA following the conclusion of the inquiry. The project is expected to be finalised by 31 March 2018.

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- 3.2. Table 1 below provides a summary of ICASA's operational plan to reduce the cost to communicate.

Table 1: ICASA's cost to communicate operational plan

Short, Medium or Long term	Initiatives	Proposed competition date
Short term initiatives (<6 months)	• Amendment of to the End-user and Subscriber Charter Regulations • International benchmark of data prices • Review of 2014 wholesale call termination regulations	• 31 Dec 17 • 30 Nov 17 • 30 Sep 17
Medium term initiatives (<12 months)	• Engagements with the DTPS on the ICT White Paper (i.e. rapid deployment guidelines, WOAN study) • Broadband market inquiry	• On-going • 31 Mar 18
Long-term initiatives (>12 months)	• Joint Working Team between ICASA and Competition Commission • Priority Markets study	• On-going • 31 Mar 18

4. Council Committee on priority markets and data services

- 4.1. The Authority's Council has established a standing Committee in terms of section 17 of the ICASA Act to:

- 4.1.1. deal with the proposed draft amendments to the End-user and Subscriber Charter Regulations;
- 4.1.2. conduct the undertaking of an inquiry into broadband / data services market in terms of section 4B and or 4C of the ICASA Act read with section 67 of the ECA;
- 4.1.3. conduct an inquiry for purposes of identifying priority markets susceptible to ex ante regulation in terms of applicable legislation; and

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4.1.4. lead the Authority's engagement / consultation with the Competition Commission during its Data Services Market Inquiry which is anticipated to commence on 1 September 2017.

5. CONCLUSION

The Authority has taken cognisance of the various stakeholder concerns over the high cost of communication and reassures the Minister that it will continue to prioritise its Cost to Communicate operational plan so as to effectively reduce the high cost of voice and data prices.

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Appendix B

Proposed DRAFT AMENDMENTS

Insertions to the End-user and Subscriber Service Charter Regulations

Amendment of regulation 8 (7) of the Regulations

VOICE AND SMS SERVICES

A Licensee must send notifications for voice and SMS usage intervals to a subscriber, the intervals must show 50%,75%,90% and 100% service depletion. The notification must be through SMS or any other applicable means.

A licensee must provide subscribers who are on open line with an option to buy additional voice services or SMS services upon depletion of such services.

If a subscriber who is on open line does not buy additional voice services or SMS services, the licensee will disconnect the subscriber from access to services and allow such a subscriber to only use emergency services and customer care services.

DATA SERVICES

Out-of bundle billing practices

A licensee must provide a mechanism for subscribers to opt -in for or opt out-of bundle charges when their data bundle is depleted.

Licensee must ensure that subscribers are:

1. Sent data depletion notifications on regular intervals through SMS or USSD, the interval must show 50%,75% ,90% and 100% depletion of data bundles
2. Sent warning notifications when their data has completely run out or depleted
3. Provided with an option to buy additional data bundles upon depletion of their allocated data through USSD platform or any other applicable means
4. Not defaulted automatically to out-of bundle data charges upon depletion of their data bundles
5. Given an option through SMS or USSD to opt-in or opt-out of data bundle usage

Where a subscriber does not opt-in or opt-out of data bundles, the licensee must automatically disconnect the subscriber from out-of bundle data usage until such time that the subscriber gives express consent or authorisation.

Expiry of data practices

Licensees must adhere to the table below with regard to validity period for data expiry:

Data bundle sizes	Validity periods
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1 MB – 50MB	1 hour to 10 days
50MB – 500 MB	1 hour to 30 days
500MB – 1 Gig	1 hour to 60 days
1Gig – 5 Gig	1 hour to 90 days
5 Gig – 10 Gig	1 hour to 180 days
10 Gig – 20Gig	1 hour to 12 months
20 Gig >	24 months

Licensees must notify subscribers with expiry of their data period within seven (7) days prior to expiry date of such data

The notification must be through SMS, USSD or any other applicable means

Licensees must provide subscribers with an option to roll over unused data when subscribers recharge with data bundles before expiry period. The roll over validity period will be as per table above.

Q.M.D. 
 



11 November 2016

General Manager: Compliance and Consumer Affairs
ICASA
Pinmill Farm
164 Katherine Street
Sandton

Dear Sir/Madam,

END-USER AND SUBSCRIBER SERVICE CHARTER REGULATIONS 2016 (the "Regulations")

MWEB writes this letter to raise our concerns with certain requirements set out in the Regulations. We also discuss certain definitions and general observations which, if taken into account and amended, will give clarity to the Regulations. When faced with new regulations, a licensee considers its business processes; practicality, including costs of implementing changes balanced against what the regulation sets out to achieve; impact on the licensee together with the impact on the end-user; fairness on the licensee and the end-user; and generally the spirit of the regulations. MWEB therefore urges the Authority to give careful consideration to our submission below.

As per the Regulations "'Fixed Service" means a **radio communication** service between specified fixed points" (our emphasis), which definition excludes fixed telephone, ADSL and fibre connections. We note that the definition was taken from the ITU Radio Regulations Articles 2012 which was used in that document to describe fixed services in relation to radio communication, however considering that the definition of "Fixed Wireless" is included in the Regulations, it is unlikely that it was the intention of the Authority to use "Fixed Service" in relation to radio communication and exclude the services mentioned above. We are not certain whether the use of "fixed line service" in the definition of "Installation" should have read "Fixed Services" or whether the Authority intended to include a definition of "Fixed Line".

The following observations are made with respect to other definitions in the Regulations. "Quality of Service Measurements" is defined but not used. Service Activation is defined but not used. Only "activation" is used. "Service Activation Time" is not used but yet defined.

Regulation 4(3) requires licensees to report to the Authority on random checks done in terms of Regulation 4(2) however there is no indication of the date for filing the report.

Regulation 5(2) requires certain information, including fair usage policies, be included in all platforms communicating a promotion. Fair usage policies should only be included in promotional material where the policy for the promotion differs from the usual policy of the licensee. It is impractical to include the obligations of the end-user at the expiry of the promotion in promotional material. The options available to the end-user may vary by the time the promotion expires. Also, the terms and conditions of the promotion will explain how the promotion will work and the end-user will need to decide what he does when the promotion expires. The platform used to communicate the promotions must also be considered, as it is impractical and difficult to convey long messages on certain platforms. We believe it is sufficient to comply with the requirements as set out in the Advertising Standards Authority of South Africa Code of Conduct. Further, although Regulation 5(3) requires the licensee to file a compliance report with the Authority with regard promotions, there is no indication of a reporting period or a filing date.

MWEB Connect (Pty) Ltd Registration number 1996/015134/07

T +27 21 596 8300 F +27 21 596 8380 www.mweb.co.za

MWEB 100 Fairway Close Parow 7500 Private Bag X001 N1 City 7463

Registered Address 251 Oak Ave. Randburg 2194 Directors F L N Letele C P Mack I Parker Alternative Director D F Theron Company Secretary L J Klink



- 3.7. In Cell C's view, ICASA has no power to determine how Cell C makes data services available on a retail basis to its own subscribers and end users. Furthermore, ICASA purports to do so by way of an amendment to the Regulation which falls outside the scope of its powers, which amendment is accordingly invalid.

4 Other general issues

4.1 RIA

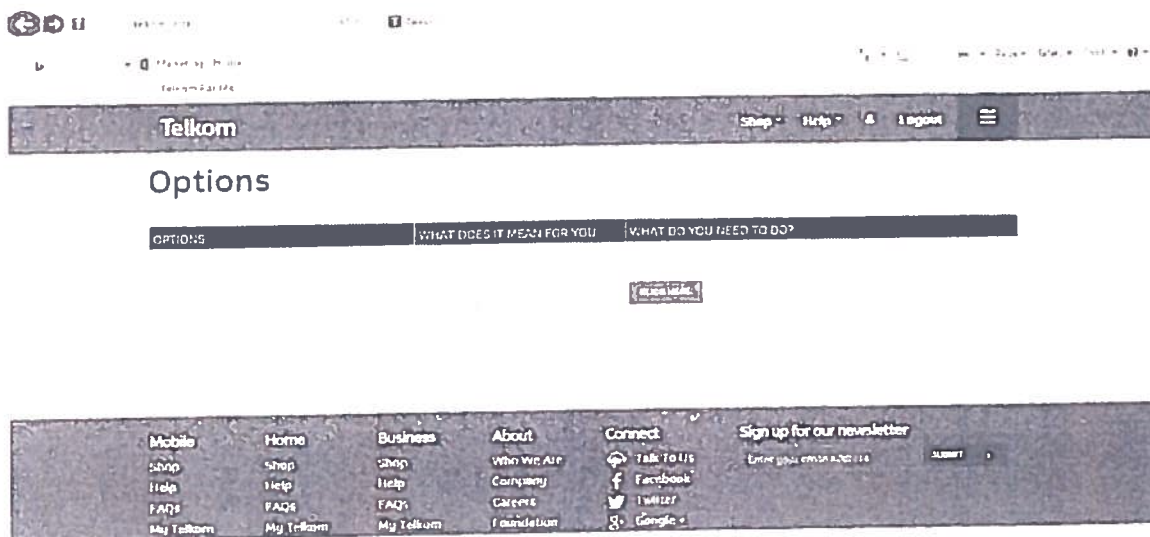
- 4.1.1 It would appear that ICASA has not considered the information provided to it by Cell C and that it has decided to pursue the Regulation despite Cell C's response. It is unclear why, having requested information from Cell C on data bundles, the Regulation purports to deal with the terms of provision of voice and SMS services as well.
- 4.1.2 Had ICASA taken Cell C's response into account, it would have recognised the technical and financial issues that will face Cell C and other operators should it impose the provisions in the Regulation on licensees. These issues will, if ICASA presses ahead with the Regulation, increase the cost of providing service, which cost will in some form have to be borne by consumers. This also assumes that ICASA has considered the technical and financial issues facing operators and whether they can be overcome, or if compliance with the Regulation is even possible.
- 4.1.3 If ICASA had carried out a RIA it would have considered what alternatives were open to it, some of which were proposed by Cell C. As part of the RIA, ICASA should have considered whether or not an alternative would be suitable or achieve a similar purpose to the obligations now included in the Regulation, and whether that purpose is in fact appropriate, i.e. the regulation of the terms of provision of data bundles, in all the circumstances.

4.2 Other similar activities

- 4.2.1 Cell C wishes to draw to ICASA's attention the numerous other types of activity that are carried on daily on similar terms to the terms on which data bundles are offered. In the utility markets, electricity and water are provided to consumers on a stepped basis, with the cost of these services increasing each time a consumer exceeds one of the thresholds or steps. Where the services are provided on a postpaid basis, electricity for example,

Since the launch of its mobile operations in 2010 Telkom has safeguarded customers utilising its SmartInternet, SmartBroadband Wireless and SmartPlan products. Once customer' data are depleted they are re-directed to an OOB screen. Upon accessing the screen customers may exercise an option to either purchase a data bundle; continue using data by going OOB; or do nothing.

In addition, customers may access a redirect page via their smartphones. The screenshot below represents Telkom's re-direct page.



3. ANALYSIS AND COMMENTS ON PROPOSED AMENDMENTS

3.1 SUB-REGULATION 8A: VOICE AND SMS SERVICES

8A.1. A Licensee must send notifications for voice and SMS usage intervals to an end-user, the intervals must show 50%, 75%, 90% and 100% service depletion. The notification must be through SMS or any other applicable means.

Telkom would like to point out that percentage based notifications would impact individual packages differently. For example, customers on high data packages would receive notifications when relatively large amounts of data are still available. It is also technically not possible to implement this functionality on Telkom's current network.

Currently Telkom sends SMS usage notifications to customers on all data plans once the following thresholds of remaining data are reached: 500MB, 100MB, 10MB, and 0MB. Customers are also

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able to check their balances through different channels: USSD, SMS, and Telkom's Mobile App downloadable from Google Play Store & App Store for IOS devices and the Telkom Self Service Portal at <https://www.telkom.co.za/login/>.

Telkom's proposal – Telkom's current usage notifications provide customers with absolute numbers in terms of the remaining data available and are viewed as sufficient. If customers are notified of the remaining data at fixed intervals they are sufficiently aware of what is still available and are able to request data for future usage and spend.

Telkom therefore proposes that its current method of informing customers on their data usage be included in the amended regulations as an alternative to providing customers with information regarding the percentage of data depleted.

8A.2. A Licensee must provide end-users who are on post-paid / hybrid tariff plans with an option to buy additional voice services or SMS services upon depletion of such services.

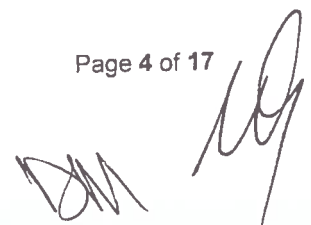
Telkom already offers voice and SMS bundles to customers via its self-service menu and online portal.

Telkom proposal - Telkom supports the proposed amendment.

8A.3. Where an end-user who is on a post-paid / hybrid tariff plan does not buy additional voice services or SMS services, the licensee will disconnect the end-user from access to services and allow such end users to only use emergency services and customer care services.

Telkom submits that by including the amendment the Authority is proposing to force Hybrid plan behaviour onto customers who may not want to be controlled in the proposed fashion. Telkom already caters for Hybrid plans in specific products namely SmartInternet Top-Up, SmartSaver and FreeMe Top-Up offers.

For post-paid customers also Telkom offers a spend limit functionality which enables them to manage their budget. For example, if a customer sets a R0 spend limit the customer will only be disconnected from access to services other than emergency services and will thus be prevented from spending more than intended. The spend limit thus provides the intended safety net for customers without being prescriptive. The customer has control over his/her spend which is configurable through various channels including call centres, stores, self-service on the USSD and via the Telkom application.

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10 Gig – 20 Gig	12 months
20 Gig >	24 months

Telkom has a variety of data plans that customers can choose from. The table below shows the different data expiry rules for Telkom's current data bundles. In many instances, Telkom's current structure for lower end bundle validity is more favourable than the proposal made by the Authority.

Top up bundles: Once-off data bundles	Validity period
25MB, 50MB, 100MB, 250MB, 500MB, 1GB, 2GB, 3GB, 5GB, 10GB	end of next calendar month
20GB	6 months
50GB, 100GB	12 months
Top up bundles: FreeMe Boost Bundles	Validity period
500MB, 1GB, 2GB, 3GB, 5GB, 10GB, 20GB	31 days
Postpaid / Hybrid bundles: SmartInternet plans	Validity period
500MB, 1GB, 2GB, 5GB, 10GB, 20GB, 50GB, 100GB	one calendar month; data is allocated on the 1st of every month
Postpaid / Hybrid bundles: FreeMe Plans	Validity period
1GB, 2GB, 5GB, 10GB, 20GB, Unlimited	31 days; data is allocated on anniversary
Postpaid / Hybrid bundles: FreeMe Family Plans	Validity period
30GB, 50GB, Unlimited	31 days; data is allocated on anniversary

Compliance - Telkom complies with the proposed validity periods for some top up bundles (once-off data bundles) i.e. the 25MB to 1GB bundles up to 60 days. However to change any current periods will involve cost for Telkom.

Technical constraints – Telkom's network is currently designed to support its current data plans and expiry rules. These plans complement current network rules to ensure that the network is operated efficiently whereby customers are able to experience a high quality service. Extending the data expiry periods prescriptively when customers already have a range of expiry periods to choose from will disrupt the current configuration in the network and result in an increase in cost because additional network resources will have to be provisioned to support the Authority's new proposal.

Potential impact in revenue - Telkom does not see any benefits if the validity periods for data usage are extended. Introducing the proposed regulation will have a substantial negative impact on Telkom's financial position.

Various measures, as elaborated on page 13 point C in Vodacom's submission⁵, are available to assist end-users to optimise their in- and out-of-bundles data usage. These measures include assisting all end-users to buy additional bolt-on data bundles, the flexibility to move between different offers, end-user empowerment to keep track of data usage to date, and notifying end-users of the appropriately sized bundles for their specific needs, etc.

Vodacom currently notifies Prepaid, Hybrid and Post-paid end-users of their in-bundle data usage. The notification informs the end-user how much data they have remaining and issues a personalised discounted bundle offer that they can purchase to remain in-bundle. The final in-bundle notification informs end-user that all their active data has run out and that out of bundle rates would then apply.

Post-paid end-users are further notified regarding their out of bundle data usage. The out of bundle data notifications inform end-users how much rand value they have spent on out of bundle usage. Personalised discounted data offers are also embedded into these out of bundle data notifications. Out of bundle data notifications for pre-paid end users are being implemented.

Vodacom is also building these in-and-out bundle usage notifications for voice and SMS services. The usage notifications at various thresholds will be send to Prepaid, Hybrid and Post-paid end-users. Vodacom is aiming to complete the implementation of the revised notification intervals by the end of the financial year.

d) Impact on end-users

The end-user will be prevented from out-of-bundle data usage, unless the end-user has given consent, on each occasion that a data bundle (or bolt-on bundle) has been depleted. The consent obtained from the end-user at the time of subscribing to the tariff plan will no longer be sufficient. The end-user's choice to give consent when subscribing to the service will no longer be valid.

The downloading of content would likely be interrupted, and any data downloaded, as part of a data session (e.g. software, a video, etc.) before the suspension will likely be 'lost' to the end-user. The end-user will have to restart the session once the access to the data service is restored. End-users will have to incur additional cost for downloading the same data more than once. Further detail on unintended consequences is detailed in Vodacom's submission⁵ on page 14 under point 3.

There is a high risk that the suspension of the service will impact on critical security, financial and emergency services. These services rely on uninterrupted data services, which, if disrupted, could adversely impact on the efficient delivery of these services, putting the public and assets at risk. The suspension of a data service, for example, could disable vehicle tracking services with dire consequences. As a result, end-user's rights may be impacted, and they may suffer harm as a result of data service disruptions.

e) Impact on industry

Whilst the requirement to notify end-users at certain intervals of bundle service depletion is reasonable, the requirement to suspend the data services unless consent has been given on each occasion that an end-user's bundle has been depleted, would have an adverse impact on the industry. It creates a regulatory burden to meet the requirement which will be very difficult (both technically and practically) to meet.

The operators will in effect be forced to suspend the data service even though consent has been given at the time of subscribing to Vodacom's service, and irrespective of the importance attached by the customer to the ability to have the service continue despite going out of bundle. Because it would be difficult to obtain consent on each occasion a data bundle has been depleted, service delivery may be suspended

⁵ Vodacom's submission in response to information request on industry/business practices pertaining to data expiry rules and out-of-bundle data billing.

regardless of whether a customer intends to give consent, or has contractually given consent at the inception of service.

Licensees will suffer financially because they will no longer be able to provide data services to end-users, even though these customers have given consent to out of bundle usage when signing up for the service, and irrespective of the extent to which the ability to enjoy such usage is important to the end-user.

Licensees will have to review and change the contract terms and conditions for Hybrid and Post-paid tariff plans in relation to the data service. Current contracted terms will no longer be valid and the terms will be materially changed.

f) Reasonableness and rationality

Additional to Vodacom's views on reasonability and rationality stated earlier, obtaining consent on each occasion an end-user's bundle is depleted, would be unreasonable, and technically and practically difficult (likely unattainable in every instance) to execute. The impact on end-users and the industry would be negative and irrational. End-users are already giving consent and per incident consent is unreasonable.

2.2 Expiry of data bundles

a) Regulations in brief

- *Data bundle sizes will have prescribed validity periods.*
- *End-user notified 7 days prior to expiry of date of expiry of bundle.*
- *Option provided to end-user to roll over unused data.*
- *Roll over period same as set validity periods.*

b) Interpretation and understanding

The Amendments set specific validity periods for data bundles sizes ranges. For example, for a bundle that falls within the data bundle size range of 1MB to 50MB, a valid period for 10 days would apply. Specific validity periods are set, which implies that validity periods cannot be shorter neither longer. The bigger the bundle size, the longer the expiry period.

The unexpired units of a data bundle must be rolled over, if an end-user recharges with data bundles [for which no definition is provided in the Amendments, nor is the meaning clear], for the same period as the original validity period set for the data bundle being rolled over.

c) Current out-of-bundle charging

For an overview of the current data expiry rules being applied, and the technical and financial/economic rationale for expiry rules, see Vodacom's submission⁵ on page 5 under point B. 1 and 2.

d) Impact on end-users

End-user choice will be adversely impacted, because the Amendment will remove the choices customers currently have in the market, and the benefit of buying data bundles of different -sizes, -rates, and -validity periods. An end user can currently either buy 1G at different price points with different validity periods, or various sizes of bundles at different price points with the same expiry period. The end-user's ability to purchase a product that suits his or her specific needs will be drastically curtailed.

Licensees are forced to offer the same validity periods across data bundle ranges. It would likely lead to a decrease in the variation in bundle offers, and the repricing of data bundles.

Data bundle sizes aimed at end-users in the 'lower end of the pyramid', i.e. the end-users currently buying hourly, daily, and weekly bundles would be negatively impacted. These bundles will likely be repriced, which may increase the cost of data.

[Note -The data contained in Annexure A is commercial information and if disclosed could cause harm to Vodacom's commercial or financial interests, as well as have a negative impact on Vodacom's ability to compete. Vodacom accordingly request that the information in Annexure A be treated as confidential, as provided for in terms of section 4D of the ICASA Act.

The uptake of micro bundle sale i.e. hourly, daily, weekly, and fortnightly bundles) over the past year has been substantial, as indicated in Annexure A.

The proposed Amendments would impact negatively on end-users optimising their requirements/needs which may vary over time.

e) Impact on industry

The potential financial/economic implications on the industry are detailed on page 8 under point 5 in Vodacom's submission.⁵

As highlighted, licensees will have to review their respective current offers, and only have data bundle sizes with the same validity periods. The increase in the validity periods, and the impact of roll over of data bundles will likely lead to an increase in data bundle tariffs. A decrease in data bundle sales will decrease income.

Vodacom, and other licensees, will no longer be able to predict and plan data service demand, and subsequently the capacity requirement to meet demand. It could hamper efficient network utilisation and investment, likely leading to the networks at times being either underutilised or over utilised/constrained

The current contractual terms and conditions for data service will have to be reviewed, which will have an impact on current contracts and future income.

f) Reasonableness and rationality

In addition to Vodacom's views on reasonability and rationality stated earlier, Vodacom is of the view that prescribing specific validity periods for data bundle sizes would be unreasonable, as it will limit end-user choice, negatively impact on competition among operators by enforcing uniform validity period onto operators for prescribed data bundle ranges, and negatively impact on data income. Operators using validity periods, and/or the extension of validity periods to compete will no longer be able to do so.

g) Legal competence

The proposed creation of prescribed data bundle offerings would entail a radical intervention in the basic product offering in the industry – ICASA will in effect prescribe the products that must be offered by licensees. This is contrary to the object of increasing competition set out in section 2(f) of the ECA, and violates the prohibition of undue interference contained in section 2(y) of the ECA. In addition, the prescription of the products to be charged for amounts to a prescription of the price modelling that must be adopted in setting charges – which is rate regulation that falls outside the powers conferred by section 69 of the ECA. This degree of intervention in a market is not envisaged outside the context of a market review and pro-competitive interventions catered for in Chapter 10. Furthermore, section 69(3) empowers ICASA only to set "minimum standards" when prescribing regulations under this section – and the creation of prescribed uniform mandatory product offerings cannot be said to fall within the concept of "minimum standards". Prescribing the basic product offering on which all prices in a service must be set goes far beyond prescribing "minimum standards" to address "billing practices" or "charging practices" as

- 17.13. Our members have consistently endeavoured to make data more available through a variety of mechanisms in difficult conditions, which includes, access to spectrum, delays in permitting and escalating compliance costs.
18. Our members have reduced the minimum cost of access to a data bundle, removing the barriers to entry. The bundles vary in sizes and periods of validity so that consumers are able to choose products and services to address their specific needs and circumstances. Product development in this regard is continuous due to the commercial imperative to constantly review the needs of consumers.
19. Access to spectrum has a direct link to network capacity and quality. It's significance grows as the demand for data grows due to increasingly spectrum hungry applications.
- a. Ubiquitous networks are dependent on access to the necessary spectrum at reasonable costs.
 - b. There is a causal relationship between quality of service access to spectrum operators.
20. It is useful for the Authority to conduct a Regulatory Impact Assessment (RIA) to some degree during the process of making regulations, for the Authority to have a good understanding of the costs of attempting to address a regulatory problem. It is important that the Authority strike a delicate balance between regulating in the public interest and compliance costs thereof, especially when the Authority seeks to exercise downward pricing pressure.

SPECIFIC COMMENTS

Voice and SMS services

21. It would seem that the Authority seeks to create a more informed consumer who is able to make better informed choices within their circumstances and needs through the introduction of notifications at specific usage intervals followed by the suspension of services in the absence of explicit consent by the end user.

Notifications

22. Regulation 8 A(1) requires notifications to consumers at specific usage intervals, but fails to consider materiality or proportionality. For example, the usage intervals specified in the draft regulation, would be considerably different for the size of the bundle, 50% of R5.00 would be considerably different to the

Compliance Costs

53. The draft regulations proposes provisions which require systems development which would need time and adds to the cost of compliance.

Time to Implement

54. The final regulations would need to recognize that provisions likely to require systems development to enable implementation will need time for development. Accordingly, we are of the view that the Authority would need to provide for the necessary time for systems development and allow for the delayed implementation thereof.

CONCLUSION

55. We are of the view that the draft regulations impose several obligations which will undoubtedly have systems development implementation costs, which appears to be counterintuitive to the apparent downward pricing pressures faced by our members.
56. The regulation reaches directly into the commercial operations of licensees, which is contrary to the provisions of the ECA.
57. In reaching into the commercial operations of licensees the Authority is almost certainly removing the competitive interplay between licensees. This will undoubtedly limit a licensee's ability to compete effectively.
58. We therefore, humbly suggest that the Authority withdraw these draft regulations and consider the following:
- a. What has been the impact of the transparency provisions that the Authority of the 2016 End User and Subscriber Service Charter regulations.
 - b. What is it that the Authority is attempting to cure?
 - c. The findings in relation to the Inquiry or questions in the project between the Authority and the National Consumer Commission.

Two handwritten signatures in black ink are located at the bottom right of the page. The first signature is a stylized, cursive 'M' followed by a flourish. The second signature is a more fluid, cursive 'M' followed by a long, sweeping flourish.



Irrational

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

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

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

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

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

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



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

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

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

Unreasonable

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

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

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

3. ANALYSIS AND COMMENTS ON PROPOSED AMENDMENTS

3.1 General comments

Definitions – Telkom is concerned that the Authority does not provide any definition of what constitutes a promotion. The EUSSC only provides guidelines on when a promotion must be filed and what information must be accompanied when filing a promotion. Telkom requests that a definition of “promotion” be included in the EUSSC in order to provide clarity to licensees.

Obligations – Telkom is of the view that certain reporting obligations being placed on operators by the Authority are unnecessarily burdensome with no apparent benefits e.g. sub-regulations 4 (4) and 5 (4) only serve to increase the regulatory burden and add to administrative costs without serving any identifiable purpose.

3.2 Insertion of Regulations 8A, 8B, and 8C respectively in the Regulations

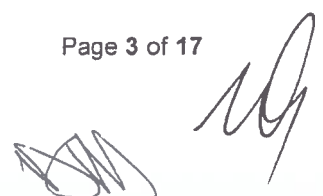
3.2.1 Sub-Regulation 8A: Voice and SMS Services

(1) A Licensee must send notifications for voice and SMS to an end-user, the intervals must show 50%, 75%, 90% and 100% service depletion. The notification must be through SMS or any other applicable means.

Telkom currently offers both post-paid and hybrid subscriber packages that include voice minutes & SMS bundles. These such subscribers are able to purchase additional voice minutes & SMS bundles at an affordable price without being “forced” to go OOB. Currently subscribers receive a SMS notification when there are 10 voice minutes remaining and again when their voice minutes are completely depleted. For SMSs, subscribers are sent a SMS notification when their SMS resources is completely depleted.

Telkom's current platform supports usage notifications based on a “fixed” absolute value methodology (i.e. usage remaining). This has proved to be easy for subscribers to understand since they do not have to calculate the amount of voice minutes or SMSs remaining, but rather know exactly how many voice minutes and SMSs are still available.

In addition, Telkom would like to point out that the Authority's proposed method of notification would impact each product bundle offering and require that Telkom reconfigure its systems when it



already has a transparent process of notifying its subscribers in place. Changing the reporting method will be costly to implement because Telkom will have to uniquely define and develop notifications for each bundle.

Currently Telkom subscribers have the option to view their voice & SMS balances at any given time by via the following options:

- a) USSD (dial *188#);
- b) SMS (send message to 188);
- c) Telkom Mobile App downloadable from Google Play Store and App Store for IOS devices;
- d) Telkom Self Service Portal at <https://www.telkom.co.za/login/>.

Note: In addition to being notified via SMS, subscribers are also able to view their balances whenever they need to do so via the abovementioned media.

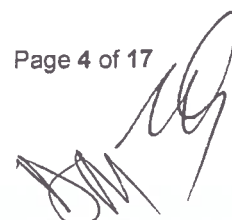
Telkom's proposal – Telkom's current usage notifications provide subscribers with absolute values in terms of the remaining "usage" available. This method, together with the specifically designed intervals, are viewed as being sufficient and transparent: if subscribers are notified of the remaining usage at the current intervals, they are fully aware of the amount of voice minutes and SMSs that are still available. Based on this knowledge they to request additional OOB "usage" for that will satisfy their needs.

Telkom proposes that its current method of informing subscribers on their usage be included in the amended regulations as an alternative means of providing subscribers with information regarding their SMS and voice usage before and when it is depleted. Telkom therefore does not support the proposed amendment.

Telkom requests that the proposed amendment either be adjusted to allow for absolute values to be included as a means of notification or that it be removed.

(2) A Licensee must provide end-users who are on post-paid plans with an option to buy additional voice services or SMS services upon depletion of such services.

Telkom already offers voice and SMS bundles to subscribers via its self-service menu, its online portal and through USSD options. Telkom post-paid and hybrid subscribers have an option to purchase once-off or recurring voice bundles. Voice minute bundles are available in three variants i.e. (1) all-network minutes, (2) Telkom mobile minutes, and (3) Telkom fixed-line minutes. These variants are offered at different denominations e.g. 25min, 100min, and 200min. Similarly SMS



subscribers have an option to purchase once-off or recurring SMS bundles. SMS bundles are available in different denominations e.g. 50, 100, 500, 1000, 1500 and 2000 SMSs.

Telkom' proposal – Telkom supports the proposed amendment.

(3) Where an end-user who is on a post-paid / hybrid tariff plan does not buy additional voice services or SMS services, a licensee must provide end-users with an option to be disconnected from access to the relevant depleted services and allow such end users to only use emergency services, subscriber care services and to receive incoming voice calls and SMSs and other free services.

Telkom offers a unique spend limit functionality that can be assigned per mobile subscriber. This enables subscribers to manage and control OOB spend. Spend limits can be set at over and above the monthly subscription cost and will enforce a limit on any additional voice, SMS or data usage.

The ability to make calls to emergency services and subscriber care services is supported on all Telkom plans, including after the spend limit has been reached.

Telkom's proposal – Telkom's current proposition is viewed to be sufficient to comply with the Authority's proposal. Telkom therefore supports the proposed amendment.

3.2.2 Sub-Regulation 8B: Data Services

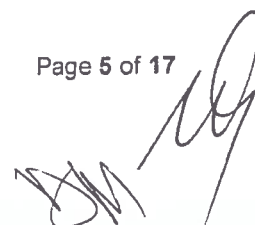
Out of bundle billing practices:

(1) A Licensee must ensure that an end-user is:

(a) sent data depletion notifications on regular intervals through SMS, push notification or any other applicable means, showing 50%, 75%, 90% and 100% depletion of data bundles;

Telkom currently sends subscribers SMS notifications when they have the following limits of data remaining on their allocated data bundles: 500MB, 100MB, 10MB, and 0MB. Telkom's current platform supports usage notifications based on a "fixed" absolute value methodology (i.e. MB remaining).

Telkom's submits that its "fixed" absolute value methodology (i.e. usage remaining) is easy for subscribers to understand since they do not have to calculate the amount of data usage remaining.



know the exact amount of what is available. The following example highlights the impracticality of the Authority's proposed method: a subscriber with a 100 GB data package will receive the first usage notification when 500MB is left. However if the first notification is at 50%, the subscriber will be notified when there is still 50GB remaining. It is unlikely that a subscriber would have to purchase additional data with 50GB remaining – prompting the subscriber that 50% of the cap has been reached will only have a nuisance value when there is still a significant amount of data available. It will be much more useful to notify the subscriber when there is 500MB remaining, this will enable the subscriber to top-up with the required amount of data if necessary.

In addition, Telkom would like to point out that the Authority's proposed method of notification would require adjustments to each product bundle offering. This method will be costly to implement since Telkom will have to uniquely define and develop notifications for each bundle.

Currently Telkom subscribers have the option to view their data bundle balances via the following options:

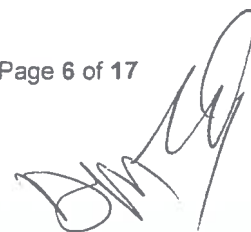
- a) USSD (dial *188#);
- b) SMS (send message to 188);
- c) Telkom Mobile App downloadable from Google Play Store and App Store for IOS devices;
- d) Telkom Self Service Portal at <https://www.telkom.co.za/login/>

Telkom' proposal – Telkom's usage notification messages to subscribers is based on absolute values and is the same across all product offerings thus optimising the subscriber experience. Telkom submits that its current method of "usage" notification, together with the specifically designed intervals, are viewed as sufficient by subscribers.

Telkom does not support the proposed amendment. Telkom requests that it either be adjusted to allow for absolute values to be included as a means of notification or that it be removed.

(b) provided with an option to buy additional data bundles upon depletion of their allocated data through the USSD platform or any other applicable means;

Telkom offers data bundles to subscribers on its self-service channels including through the *180# USSD menu, mobile applications for Android and IOS, its online portal, or through all major banks via ATMs and internet banking and through a myriad of retail stores.



however, change this option to an option which enables them to be re-directed to the Telkom OOB re-direct page should they so require.

A spend limit option is available to post-paid subscribers whereby subscribers can choose to specify the additional amount they are prepared to spend once their in-bundle limit has been used up. This ensures that there is no bill shock and that any additional spend does not exceed the subscribers specified spend limit amount.

Telkom's proposal – Telkom believes that subscribers should be given the choice to select packages which allow them to automatically default to OOB if they so prefer – the FreeMe post-paid plans have proved successful in this respect in that they allow subscribers to choose packages which meet their specific requirements

Telkom does not support the proposed amendment since it limits consumer choice and stifles competition.

Expiry of data practices:

(3) A licensee must provide prepaid data bundles with minimum expiry period of three (3) years, save where such prepaid data bundles have been exhausted prior to expiry of three (3) years, in line with section 63 of the Consumer Protection Act, 2008 (Act No. 68 of 2008)

Telkom currently offers a variety of prepaid data bundles that subscribers can choose from with different validity periods, with the longest being 12 months. The table below shows Telkom's different validity periods for each prepaid bundle.

Once-off data bundles	Validity period
25MB, 50MB, 100MB, 250MB, 500MB, 1GB, 2GB, 3GB, 5GB, 10GB, 20GB	End of next calendar month
20GB	6 months
50GB, 100GB	12 months
FreeMe Boost bundles	Validity period
500MB, 1GB, 2GB, 3GB, 5GB, 10GB, 20GB	31 days

Extending the current validity periods to three years will have a negative impact on current data bundle pricing and differentiation. In having to comply with the proposed amendment, Telkom will have to withdraw its current offerings and redevelop its offerings to packages with three year validity periods. This will result in data bundles with higher price points and will negatively impact subscribers.

Technical constraints – Telkom's network is designed to support its current data Plans and expiry rules. The current plans complement the network rules to ensure that the network is operated efficiently and that subscribers experience a high-quality service. Extending the data expiry periods to three years prescriptively, when subscribers already have a range of expiry periods to choose from, will disrupt the current configuration in the network. This will result in an increase in costs due to the need for additional network resources which will have to be provisioned to support the Authority's new proposal. This will result in increase in the cost of maintaining the network.

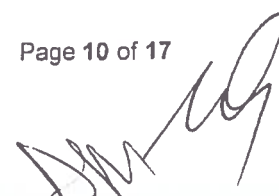
Extending the validity period to 3 years will result in SIMs being kept as active for longer. This could result in fewer numbers being available in the mobile industry for number re-allocation.

Potential financial impact –
[X]

Competition constraints – When Telkom develops a new data offering it provides different value propositions to subscribers. Product differentiation and subscriber choice is optimised when different data expiry rules can be applied to different packages. This ensures that the relevant service offerings are attractive for different types of subscribers. Subscribers are currently able to select a package offering according to their specific needs. When selecting their data bundles they are able to budget for the correct amount of data that they think they will require and are unlikely to forfeit their in-bundle data.

Extending the data validity periods will skew the value propositions of existing products and will restrict competition in the industry. Smaller operators like Telkom will be restricted from providing innovative products and price offerings to compete with the larger incumbent operators. The proposed amendment infringes on Telkom's ability to differentiate its products by means of different expiry periods based on subscriber needs. The ability to offer a variety of expiry periods has been a key differentiator in Telkom's service offering which it has used to compete in the market.

Telkom's proposal – When Telkom develops a data product it considers the impact on cost and revenue before commercially launching that particular product. Forcing changes to the dimensions



of its current products via a change in data expiry regulation is not feasible. It will lead to potential revenue losses and an increase in cost. This will, in turn, lead to less funds being available to invest in network improvement which is necessary for expansion and growth.

The only way for Telkom to recoup its losses will be by raising its data prices. This goes against the principle of bringing down the costs to communicate. Telkom therefore proposes that the current expiry rules, as they apply to our existing data products, are sufficiently flexible and should remain in place. Amending any validity periods on Telkom's existing bundles will most likely have a negative impact on current price offerings e.g. extending periods will most likely result in Telkom having to increase its prices.

Telkom does not support the proposed amendment as it will negatively impact our ability to compete innovatively.

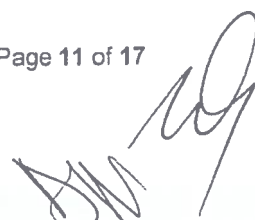
Roll over of unused data of monthly data allocation and transfer of monthly data allocation:

(4) A Licensee must provide an option to post-paid users to roll over unused data of monthly data allocation to the next billing period or to transfer the monthly data allocation or a portion thereof to other end-users on the same network.

Telkom has a multi-SIM product which allows for data resources to be shared amongst multiple users. This functionality enables the primary SIM, which can be any capped post-paid data product offering, to have multiple secondary SIMs linked to it. The available data can be utilised by all the individual SIM cards within the multi-SIM group including the primary SIMS.

Technical impact – Telkom currently has a variety of data bundles which are limited to time of day, days of the week, hours in a day and specific sites such as universities, social media, etc. A subscriber can elect to have a combination of these types of bundles, including time-based and volume-based bundles. A selection process which allows subscribers to transfer a multitude of different types of package to another subscriber is complicated and costly.

Enabling the transfer of data between different bundles is complex and enforcing such will not come without its challenges which will most likely result in an increase in subscriber frustrations and complaints. Hence, this will negatively impact on the subscriber experience.



- 24 If the Authority wishes to impose an obligation on licensees to provide end-users who are on post-paid plans or on hybrid tariff plans with the options contemplated in 8A(2) and 8A(3), it should be clear that the licensees can provide the option to the end-user and the end-user can exercise that option at any time prior to or after depletion of the allocation included in his or her contract tariff plan, including at the time that the contract is concluded. This would permit the end-user to exercise the freedom of choice of determining the services required in terms of its contract with the licensee and would prevent disruptions to end-users who require continuous service and/or wish to avoid OOB rates. The regulation should make it clear that the "option to buy" is not to be provided only "upon depletion of such services" but rather at any time, so that the additional voice services or SMS services continue to be available upon depletion of the monthly allocation.
- 25 Vodacom currently has such options available to end-users.

Technical feasibility

- 26 If the end-user is provided with an option and exercises that option to buy identified packages (e.g. bolt-on bundles) prior to the depletion of the original services, it is technically feasible for Vodacom (at the time of depletion of the original services) to automatically allocate the pre-selected additional services.
- 27 It is not possible to provide the end-user with the necessary option and to permit the exercise of that option in the event that core network elements required to rate voice and SMS consumption are offline (whether due to maintenance, upgrades or network / system failures). In the case of aforesaid failures Vodacom will still attempt to offer customers service in order to protect the customers' right to service. This is done via a degraded mode of service that allows for limited service in the case of failure in the rating and bundle management environment. In these instances, it will not be technically possible for Vodacom to monitor usage in real time in order to timeously notify and disconnect customers where this option was selected by customers.
- 28 Save where operations may be hampered in the event of network and system failures, it is technically possible to notify end-users of the available options when services are depleted. However, in respect of "OneNet", "Closed User Groups" and voice and SMS bundles supplied on a "corporate wide" basis, those services are not monitored in real time and are rated offline. Consequently, it is not technically possible to facilitate the option notification and the exercise of such option immediately at the time of depletion of such services.
- 29 While roaming voice and roaming SMS services are excluded from the scope of the proposed amendment, Vodacom notes that these services can similarly not be monitored in real time to enable an option to be provided (or disconnection to occur) immediately upon depletion of the services, as the services are rated offline. The authority is referred to Vodacom's submission dated 12 May 2017, section D17 for more detail. Similarly, premium rate and international dialling services are not applied to reduce the voice and SMS units allocated on a monthly subscription basis in terms of post-paid / hybrid contracts. These services are also not offered as separate bolt-on bundles. The premium rated and international services are charged individually as each service recovers its own unique direct cost. The use of these services is consequently not subject to this regulation.

Impact on end-users and impracticalities

- 30 The impact of this proposed amendment ought to be limited if the Authority permits the end-user to exercise the proposed options at an early stage, including at the time that the post-paid or hybrid contract is concluded. If however the Authority requires that the end-user can only



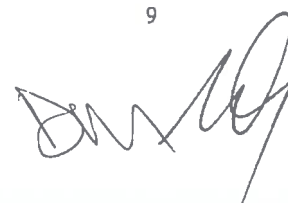
option on every occasion (for every session), before data services can be provided in the absence of a new bundle.

- 41 Vodacom understands that this regulation will not apply to-
- 41.1 Roaming data services;
 - 41.2 End-users who never buy data bundles but rather use the network on an ad hoc basis and pay agreed rates on that basis.

Technical feasibility

- 42 As was pointed out in section C.3 of Vodacom's submission dated 9 May 2017, it is not always technically feasible to present options and to obtain consent upon depletion of a data bundle.
- 42.1 For example, Vodacom is not able to track data consumption in real time in all of its offerings. For example, traffic to and from dedicated corporate Access Point Names (APN) is not rated in real time.
 - 42.2 There are technical limitations applicable to APNs which render real time billing and the proposed options to be presented upon depletion of a bundle not feasible. Specifically, given the manner in which multiple concurrent quota reservations are managed, it is not possible to assess the point of depletion of a bundle in real time.
 - 42.3 To elucidate on the quota system which applies in APNs, Vodacom sets out the following analogy-

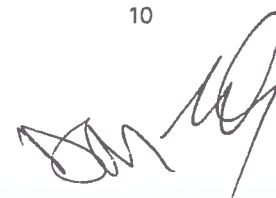
A person (APN corporate end-user) has R170 and sends his children to the shop to buy goods where he is not sure of the price of each item. He sends his first child to the shop with R100 to buy milk and bread; the second child with R50 to buy a newspaper and the third child with R20 to buy sugar. No money is left to buy anything else while the children are away. When each child returns, at different times, each returns with different change. With the returned change, there is sufficient money to buy additional items, but until the change is returned, there is no money.
 - 42.4 This is essentially how APN quota reservation works. For each session, each corporate SIM receives a reservation of data as it connects. If the APN is arranged in a manner which permits say 10 SIMs to connect at once and allocates data to each, the eleventh SIM will not be able to connect because the data reservation is depleted. However, once a SIM disconnects, data will then again become free from the quota and may be allocated to a new SIM. In these circumstances, it is not possible to determine the point of "depletion".
 - 42.5 It is not possible to provide the end-user with the necessary option and to permit the exercise of that option in the event that core network elements required to rate data consumption are offline (whether due to maintenance, upgrades or network / system failures). In the case of aforesaid failures Vodacom will still attempt to offer customers service in order to protect the customers' right to service. This is done via a degraded mode of service that allows for limited service in the case of failure in the rating and bundle management environment. In these instances, it will not be technically possible for Vodacom to monitor usage in real time in order to timeously notify and disconnect customers where this option was selected by customers.



- 42.6 Furthermore, it is not technically feasible for Vodacom to present end-users with the required options on a "per bundle" basis. Vodacom can only provision this functionality at a customer level in terms of which Vodacom will provision "no OOB billing" for the customer. The customer will therefore not have the option to, for example opt-in to OOB billing for "general internet browsing" data bundles and opt-out of OOB billing for "YouTube" data bundles. The setting will apply to all data bundle categories used by end-users.

Impracticalities and impact on end-users

- 43 We refer to section C.3 of Vodacom's submission dated 9 May 2017 and section 2.1d of Vodacom's submission dated 18 September 2017. The points made in those submissions remain valid and should be taken into account by the Authority.
- 44 The impracticalities and negative impact on end-users are influenced significantly by the requirement that the option must be provided to the end-user "upon depletion". If the end-user could exercise an option at an earlier stage, so that the services used could be automatically allocated to an end-user as per his or her pre-selected alternative arrangement, many of these impracticalities and negative end-user impacts could be addressed.
- 45 On Vodacom's current interpretation of these provisions, the Authority seeks to prevent the end-user and licensee from agreeing on the default position in the event that the primary bundle is depleted. This significantly reduces end-user choice (which is dealt with more fully below) but also will have significant negative impact in at least the following areas:
- 45.1 M2M services – assuming it is technically feasible (which is not the case in respect of M2M services provided on APNs), a meaningful option cannot be presented to M2M end-users upon completion of data bundles, for at least the following reasons-
- 45.1.1 M2M SIMS, by nature, are inserted into equipment that is un-manned and which cannot respond to a notification requiring an option to be exercised;
- 45.1.2 M2M devices are typically programmed to ignore SMSs received from any MSISDN apart from the end-user's SMS gateway, to mitigate against spam SMSs that occupy limited memory available on SIMs.
- 45.1.3 Vodacom is not always aware of which SIMs are used for M2M applications and consequently it is not always possible to distinguish M2M end-users from other end-users.
- 45.2 Even in cases where Vodacom is aware that the SIM is allocated to M2M devices and the end-user has an administrator, it is not practical to expect the end-user's administrator to deal with such option requirements. In many cases, an end-user may have hundreds, thousands or hundreds of thousands of SIMs connected to devices within its administration. In the future, administrators are likely to have millions of SIMs subject to administration. If an administrator were required to deal individually with, and exercise an option in respect of, each SIM under administration, this would likely result in end-users incurring large additional costs impacting on the viability of their businesses and these applications within their businesses.
- 46 End-users use SIM cards in a number of devices which cannot ordinarily display usage notifications, such as dongles, routers and tablets. On these devices, it is impractical to present options to the end-user and to expect them to exercise those options in respect of that device. Consequently, similar problems are expected as with M2M devices.



AMENDMENT OF REGULATION 8 BY INSERTING 8C ON END-USER EDUCATION AND AWARENESS

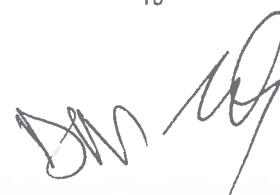
83 Vodacom has no comments on this regulation.

AMENDMENT OF REGULATION 13

84 Vodacom has no comments on this regulation.

SHORT TITLE AND COMMENCEMENT

85 In the event that the Authority wishes to promulgate the proposed amendments, licensees should be given sufficient time (at least 6 months) to develop systems in order to be able to comply with the regulations from the date of publication. Vodacom would not be in a position to comply immediately with the requirements of the proposed amendments from the date of publication.



providers, and that this would require licensees to develop systems to allow for this which might have the unintended consequence of driving up the data prices. WAPA accordingly recommends that this requirement in regulation 8B(4) be deleted.

- Proposed Regulation 8C

14. WAPA understands the need for consumer awareness on service offerings and Internet usage, but is of the view that this section results from the conflation of the different markets in which ECS and ECNS licensees operate, as noted above. The content of this proposed regulation suggests that the Authority intends mobile operators to conduct these education awareness campaigns. It would not be feasible to expect all licensees to conduct such education awareness campaigns.
15. WAPA accordingly recommends either the deletion of this proposed regulation, alternatively the amendment of the wording thereof to indicate which category or market of ECS licensees is required to run such education awareness campaigns.

Amendment of Regulation 13 of the Regulations

16. WAPA notes this proposed amendment.

Short Title and Commencement

17. WAPA recommends that the Authority ensure that the final regulations that result from this process do have a phasing-in timeline rather than coming into operation on date of publication. This will ensure that licensees understand the new Regulations and can comply with the provisions contained therein, and will also allow the Authority to ensure that internal processes are in place to deal with the new Regulations.

Conclusion

18. WAPA thanks the Authority for its efforts herein, and requests that the Authority afford it the opportunity to make oral presentations at any public hearings which it may elect to conduct in connection with this process.

Regards,
WAPA Regulatory Advisors

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3. Options upon depletion of data bundles

ICASA objective

- End-users must be given option to opt-in or out of being charged OOB data rates to avoid bill shock

Regulation 8B(1)(b)-(d) and 8B(2)

- Upon depletion of every data bundle, provide end-user with option to either buy additional bundle or consent (per session) to be charged OOB
- Not defaulted to OOB charge when bundle is depleted – disconnect if no consent

Implications

- Reduced customer choice - uninterrupted data experience no longer an option
- Not always technically feasible
- Impractical for certain applications (M2M) and devices
- Disruption of critical applications (emergency and security)
- Adverse customer experience

[Handwritten signature]

depend on open lines - consent -

112.000 10000

generally use updated plans

4. Options upon depletion of Voice and SMS services

ICASA objective

- End-users must be given option to opt-in or opt-out of being charged out of bundle rates to avoid bill shock

Regulation 8A(2) and (3)

- Post-paid end-users to be given option to buy additional bundles upon depletion of monthly contract units
- Post-paid and hybrid end-users to be given option to be disconnected upon depletion

Implications

- Not always technically feasible to provide upon depletion
- Impractical for certain applications (M2M) and devices




Noti need in order to provide this option 13



8B (1) (a)

Sub-regulation
(Data Services)

8B (1) A licensee must ensure that an end-user is:
(a) sent data depletion notifications on regular intervals through SMS, push notification or any other applicable means, showing 50%, 75%, 90% and 100% depletion of data bundles.

Description and Implications

- From previous experience customer prefer an absolute value methodology. Telkom moved away from a percentage based notification due to customer feedback.
- Telkom's platform supports usage notifications based on an absolute value methodology e.g. 500MB, 100MB, 10MB and 0MB.
- Telkom believes an absolute value is easier for the end-user to understand since the end-user is notified of actual data remaining rather than having to calculate such themselves.
- Changing to percentages would require Telkom to reconfigure all systems and products which would incur significant cost.
- The ability to check the value of services remaining is provided via a variety of user friendly channels.

Telkom

Telkom Proposal

- The current method of providing usage notifications is sufficiently transparent to provide end-users with enough information to enable informed decisions
- The proposed amendment should be adjusted to include absolute values an alternative option to percentages
- Telkom supports notifications based on absolute values and not percentages

8B (3)

Sub-regulation (Expiry of data practices)

8B (3) A licensee must provide prepaid data bundles with minimum expiry period of 3 years, save where such prepaid data bundles have been exhausted prior to the expiry of 3 years in line with section 63 of the Consumer Protection Act, 2008 (Act No.68 of 2008).

Description and Implications

- Smaller players like Telkom will be restricted in their ability to provide innovative products and pricing which differentiates them from the larger operators.
- Technically Telkom's network is designed to support its current data plans and expiry rules – enforcing a minimum period of three years will disrupt the current configuration of the network which will lead to increases in network costs
- Extending the minimum validity period to 3 years will result in SIMs having to be kept active for 3 years even if they are not used. This will result in fewer numbers being available for number allocation.
- Telkom offers a variety of validity periods, ranging between 31 days and 12 months. Introducing a minimum validity period of 3 years will negatively impact data bundle pricing and differentiation. Product differentiation and subscriber choice is optimised when different expiry rules can be applied to different packages in meeting consumer needs

Telkom

Telkom Proposal

- The proposed data expiry rules will result in cost increases and a reduction in revenue. This will result in less funds being available for network improvement which is necessary for expansion and growth – the costs to communicate.
- The proposed amendment will limit Telkom's ability to compete effectively

8B (4)**Sub-regulation
(Data Services)**

8B (4) A licensee must provide an option to post-paid users to roll over unused data of the monthly data allocation to the next billing period or to transfer the monthly data allocation or a portion thereof to other end-users on the same network.

Description and Implications

- Roll-over of unused data especially on bigger bundles will have a significant negative financial impact.
 - Telkom has a multi-SIM product which allows a primary SIM to have multiple secondary SIMs linked to it
 - Enabling the transfer of data between different types of bundle is complex and enforcing such will not come without its challenges.
- This is likely to have a negative impact on subscriber experience

Telkom Proposal

- Telkom believes that allowing customers to elect the multi-SIM option is sufficient to allow customers to transfer unused data
- The proposed regulation has significant technical and financial constraints

Telkom

to one's account for usage. Prepaid data is deferred and recognized only upon full depletion or expiry. Purchasing airtime means a credit in your account which will enable one to consume directly from the balance or to purchase services i.e. to purchase a data bundle. Airtime credit is kept in the customer's prepaid wallet (i.e. for 36 months) or until the customer utilizes the credit.

3. Supplementary submission – network impact

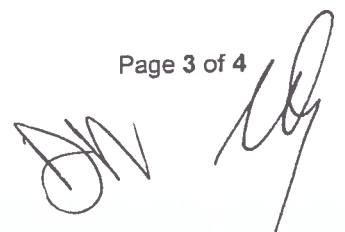
Network management – Telkom's network management analyse usage assumptions based on historical product trending and usage consumption. When customers buy products such as data bundles network engineers can dimension the network to be able to cater for the data capacity required to carry the traffic over the product validity period.

Data expiry rules complement other network dimensioning rules to ensure that the mobile service is provided in the most efficient manner and that overall subscribers can enjoy a high quality, consistent experience on Telkom Mobile's network. Average usage per customer is increasing exponentially, which means that customers will use more data as time passes.

Network capacity management is based on peak hours and this represents additional challenges in managing capacity for future consumption based months of accumulated data bundles. Usage on the Telkom network is largely driven by the usage of data bundles with a small proportion of out of bundle usage.

Network congestion is caused mainly by busy hour network usage (i.e. the hour of the day when most of the network capacity is being used) with a significant amount of capital and operational expenditure is used to cater for this period of high network usage. One of the main factors contributing significantly to these usage peaks is month end consumption patterns. This is caused by the fact that users rush at the end of the month to use up their data.

Impact of 3-year expiry – Extending the validity to 36 months would mean that it would be challenging to understand when the product will be consumed and could lead to network congestion and overall poor customer experience. Networks would as a result have to be built to now cater for a larger increase in usage in future because the data bundles would not expire for a period of three years. It will also result in accumulation of massive amounts of data over a long period and the consequence of this will be exceptionally high demand of network resources closer to the expiry date.

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Apart from the capital and operational expenditure required to upgrade the network, it will be very difficult to manage this demand. This will also result in an inefficient use of the network as the capacity created to handle the potential peaks will be idle during non-peak hours. It will increase the average cost of providing packages since the network would have to be provisioned in such a way that it would be able to cater for possible data peaks by planning for same over a longer time span.

Given the dynamic nature of mobile services, product offerings are likely to change and any data roll-overs on legacy products would have to be managed. This will require additional network resources, thus increasing overall costs. Furthermore, the cost to maintain the SIM cards and MSISDN's on the network would be onerous and prohibitive.

4. Supplementary submission – financial impact

Data revenue is deferred to Telkom's balance sheet as a liability and only recognised when used or expired. Extending the expiry period to 3 years will increase Telkom's liability on its balance sheet and as a result increase its leverage and decrease its working capital ratios. As the smallest network operator, Telkom will lose some of its competitive advantage in the market because expiry rules for the whole market will be the same. Telkom's balance sheet liabilities would potentially be worse than its competitors and as a result it would become more difficult and costly to raise funding to continue to invest and grow the network.

END OF REPORT



13 March 2018

ICASA
Chairperson: Priority Markets and Data Services Committee
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By email: prioritymarkets2017@icasa.org.za

Dear Sirs

**FURTHER SUBMISSION IN RESPONSE TO THE PROPOSED AMENDMENTS TO THE
END-USER AND SUBSCRIBER SERVICE CHARTER REGULATIONS, 2016**

Thank you for the further opportunity to supplement our oral presentation to you on Monday, 5 March 2018. We have set out the answers to your questions below:

1. Definition of a prepaid credit

Our suggested definition of "prepaid credit" is "the conversion of money as cash, into money in another form". As we have repeatedly stated, one has to differentiate between a "prepaid certificate, card, credit, voucher or similar device" and the item one purchases with the "prepaid certificate, card, credit, voucher or similar device". Data is the item one purchases with the "prepaid certificate, card, credit, voucher or similar device". Data can therefore never be money in another form.

2. What should happen to unused data?

Cell C has explained that the acquisition of a data bundle, however this may take place, amounts to no more than the acquisition of the right to access that amount of data during the relevant period. This period is determined by the capacity that is forecast on the network, determined by estimated demand.

Access to data on a network (i.e. capacity) is produced instantly. It cannot be stored. If a subscriber does not make use of the access rights that it has acquired to the data

Directors: Kuben Pillay (Non-Executive Chairman), Laurence Nestadt (Non-Executive Deputy Chairman), José dos Santos (CEO),
Tyrone Soondarjee (CFO), Herman Kotze, Brett Levy, Mark Levy, Joe Mhlumye, Robert Pasley, Christopher Seabrooke



service, that access expires – it cannot be indefinite because that would have the prejudicial consequences for the licensee that we have described in our written submissions, as to technical configuration and operational and financial prejudice. The network has to be kept operational regardless of whether or not end users choose to make calls or use the internet – but the likelihood of use is factored into the operation of the network.

3. Regulation 8B(3) in the form of an annexure or schedule to the Regulations

ICASA may attach schedules to Regulations as a supplement to those Regulations. However, it is the content of Regulation 8B(3) which is an issue and attaching the regulation by way of a schedule would not resolve the fundamental problem with the inclusion thereof.

4. Out of bundle rates: Vodacom's proposed glide path

Cell C does not agree with Vodacom on this issue. Before any such decision is made, a proper enquiry in terms of Chapter 10 of the ECA must be concluded. Cell C undertakes to fully cooperate and take part in any such enquiry.

5. IFRS rules as applied to airtime and data bundles

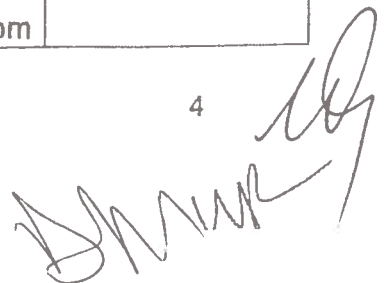
Cell C received an additional question from ICASA. ICASA has asked whether revenue from prepaid data bundles and airtime is treated the same way under the International Financial Reporting Standards (IFRS) accounting rules, and if so, why the revenue would not be treated the same way when applying section 63(2) of the CPA.

Airtime and data bundles are treated in the same way for IFRS. As Cell C explained in its submission on 9 May 2017, Cell C recognises prepaid data revenue (or airtime revenue) when the data bundle is redeemed. Once the data bundle is activated, it is valid for the period indicated in the terms and conditions relating to the data product.

Airtime and data bundles are similar in that they are redeemed on the earlier of utilisation, expiry or churn. Should a data product expire in terms of the product terms

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	Action Item	Person Responsible
	The following inputs were noted: • Option 2 will address the challenges of the regulation that proposes that data should expire after 3 years. • A rechargeable activity will re-activate the expiring data. • Under option 3, the regulation does not prescribe how operators should rollover data, to give operators a chance for innovation. • The implementation date will be one month after the publication date. The Media statement scheduled for 10h30 will present the following: • Usage of notification • Expiry rules • Out of bundle billing • Transfer of data • Consumer education It was resolved that the announcement on the final regulations (End-User and Subscriber Service Charter) be approved. <i>Manager Customer Complaints: CCA, Snr Manager: Com&IR and Manager: Wholesale Services: PRA joined the meeting @10h10 – 11h00.</i>	
8.	Quarter 4 Report The purpose of the submission was to present quarter 4 performance of the organisation to Council in order to determine progress being made towards delivery of out outputs planned in the APP, and targets being pursued and recommend any corrective measures where there are challenges. The following inputs were noted: - • ARC approved the Q4 report without any changes. • A report will be submitted to Council with feedback from	CEO



- Telkom has no objection to the proposed amendment.
- Jo-anne Stolp proposed that the phrase "through the USSD platform or..." should be replaced with "through the USSD platform and..."
- Cell C indicated that this provision is unnecessary as the option to purchase data bundles exist all the time.

The Authority's preliminary view

The Authority's preliminary view is that this provision should be retained to provide an option to end users to buy additional bundles as not all licensees provide this service to their end-users.

2.2.3.4. Submissions received in relation to draft regulation 8B(2)(d):

- MWEB indicated that this proposal may lead to end-users losing downloads and being forced to initiate a download for the second time leading to extra charges.
- SANCU proposed that the following words be added after the word bundles "unless the end-user has opted-in for out of bundle charges" in line with regulation 8B(1).
- Vodacom indicated that it obtains end-user consent for out-of-bundle usage at the time the end-user subscribes to the Hybrid or Post-paid tariff plan of their choice. Vodacom stated per incident consent will create regulatory burden on licensees to meet the requirement which is unreasonable, and technically and practically difficult (likely unattainable in every instance) to execute.

- Vodacom also stated that suspension of the service upon depletion of data bundle will impact negatively on critical security, financial and emergency services, which rely on uninterrupted data service.
- Telkom stated that this option to default automatically should ultimately be for the customer to choose, and should not be enforced by default, as this could lead to poor customer experience. Telkom also stated that its low OOB data rate at R0.29/ MB reduces the likelihood of bill shock if customers are made aware that they are being charged OOB rates

The Authority's preliminary view

The Authority's preliminary view is that this provision is necessary to provide protection to end users against bill shock owing to significant difference between in-bundle and out-of-bundle rates of up to 2000%. The Authority is of the view that current practice by licensees to charge end-users, particularly prepaid users, out-of-bundle rates using their airtime without their express consent is prejudicial as some users may not be fully aware of the consequences of exceeding their data bundle. The Authority is not aware of technological or technical challenges that would prevent licensees to automatically prevent its subscribers from paying out-of-bundle data rates without their consent once they deplete their data bundle as Telkom Mobile is providing this service to its subscribers.

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