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GENERAL NOTICE

NOTICE 558 OF 2008

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

NOTICE IN TERMS OF SECTION 4B OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ACT

The Independent Communications Authority of South Africa ("the Authority"/ "ICASA") hereby gives notice and invites written comments in terms of section 4B of the Independent Communications Act of South Africa Act 13 of 2000, as amended, ("ICASA Act") on the interpretation and application of the definition of Under Serviced Area ("USA") as defined in the Cell C licence attached in Annexure A below.

The purpose of the enquiry is to assist the Authority in making a determination whether or not there has been compliance by Cell C with its Universal Service Obligations (USOs) as set out in the Cell C licence.

Interested persons or organisations are hereby invited to submit written representations or documentation, including an electronic version in Microsoft Word or PDF, on their views in accordance with the provisions of section 4B of the ICASA Act by no later than 60 (sixty) days from date of publication of this notice.

Persons or organisations who wish to make any representation or submit any relevant documents must also indicate whether they would like an opportunity to make oral presentations at a hearing., which must not exceed one (1) hour in duration.

Written representations or documentation may be posted or hand delivered, for the attention of:
Ms. Michelle Morgan, Acting Senior Manager: Licensing and Compliance

Private Bag X 10002	or	Block A, Pinmill Farm
Sandton,		164 Katherine Street
2146		Sandton, 2146

Where possible, written representations should also be e-mailed to MMorgan@icasa.org.za

All written representations or documentation submitted to the Authority pursuant to this notice shall be made available for inspection by interested persons at the ICASA library and copies of such representations and documents can be obtained upon payment of the prescribed fee.

Interested persons or organisations who submit written representations or documentation should indicate, upon submission, whether there is any part thereof which should be treated as confidential. The request and reasons why any part of the representation or documentation be treated as confidential must be submitted at the same time with the written representations.

ICASA will consider whether to grant or refuse the request for confidentiality in accordance with the provisions of the ICASA Amendment Act and other applicable legislation. Where the Authority refuses to treat any part of the representation or documentation as confidential, the person or organisation making such representation may withdraw the representation or documentation in question and the Authority will not take it into consideration when making its findings.

In order to provide for a wider basis of representations to be made and documents to be submitted during the inquiry, the Authority has compiled questions pertinent to this issue.

These questions have been incorporated into the annexure hereto entitled "INTERPRETATION OF THE DEFINITION OF UNDER SERVICED AREA ("USA") AS DEFINED IN THE CELL C LICENCE".

The findings and conclusions or recommendations made by the Authority following the enquiry will be published in a Government Gazette as provided for by section 4C of the ICASA Act.

PARIS MASHILE
CHAIRPERSON
ICASA

ANNEXURE A:

INTERPRETATION OF THE DEFINITION OF UNDER SERVICED AREA ("USA") AS DEFINED IN THE CELL C LICENCE

1 Background

In terms of its Mobile Cellular Telecommunications Service (MCTS) Licence, Cell C is obliged to roll out 52 000 CSTs, within the period of 17 November 2001 to 17 November 2008. Cell C is required to submit to the Authority its roll out plans for CSTs in the Under-Serviced Areas (USAs) it has identified.

On 18 September 2003 ICASA took a decision to approve certain roll out plans submitted to it by Cell C in respect of the establishment of CSTs for the period up to 31 August 2003. The decision was challenged in a judicial review instituted by MTN.

On 26 February 2007, the High Court handed down judgment, reviewing and setting aside the Authority's decision of 18 September 2003. Accordingly, the Authority is now required to reconsider the Cell C CST roll out plans anew.

The remaining sections detail the Authority's views of the various components of the Cell C USA definition and its roll-out obligation.

2 Definition of an USA

Clause 1.47 of the Cell C licence defines an USA as follows:

"any city, town, township, shanty town, location, village or human settlement or any part thereof where less than 10% of the inhabitants of the area have access to PSTS exchange lines at the date of issue of this licence and where it is necessary to roll out Community Service Telephones to address the reduction of geographical disparities through proportional distribution of such phones and shall, in any event, not be areas in the territory that are listed in Annexure A2 ";

3 Key Components of the Definition

Set out below are the key components of the definition and the interpretation guidelines the Authority proposes to adopt in respect of each component:

- **"any city, town, township, shanty town, location, village or human settlement or any part thereof"**

3.1 This could be interpreted to mean collectively, any area or settlement inhabited by human beings.

3.2 It is proposed that, from a practical point of view, "any part thereof" should be construed to mean a municipally or other **officially** demarcated area including a sub-place name within a city, town, shanty town, etc. By way of an example, it would mean an officially identifiable suburb of a town or city, or a municipally defined section, ward or zone of a township or sub-place name as referred to by Statistics South Africa.

Question 1.: Do you agree with the Authority's view that only an officially defined area, as per Statistics SA, is acceptable?

- **"where less than 10%"**

3.3 The 10% refers to 10 % of the inhabitants of an area (e.g. city, town, shanty town, etc) or any part thereof.

- **"inhabitants"** (that have access to PSTS exchange lines)

3.4 The word should bear its ordinary meaning i.e persons who live in or occupy a place. The words "live" and "occupy" should be interpreted to mean living in or occupying a place with some degree of permanency.

3.5 In addition, for the purposes of this definition, reference to persons (as inhabitants) should be interpreted to mean individual persons as opposed to households. It is the Authority's view that having regard to the totality of the choice of words used in the definition, it was clearly the intention of the Authority to deviate from any meaning that would relate to households.

3.6 From the point of view of access to accurate data, the Authority proposes using the same definition of "inhabitant" as Statistics SA did in the 2001 census and as discussed in section 3.10 below.

Question 2.: Do you agree with the Authority's definition of "inhabitants"?

- **"access to PSTS exchange lines as at 21 June 2001"**

3.7 **"PSTS"** - this refers only to access to PSTS exchange lines as opposed to mobile cellular phones (mobile penetration). It includes normal Telkom fixed line and public pay

phones as provided for in section 39 of the now repealed Telecommunications Act, 103 of 1996;

Question 3.: Do you agree with the definition of PSTS adopted by the Authority, namely that it excludes any reference to mobile phones and includes both fixed line access to the home and public payphone access?

3.8 **"Access"**- there is not as yet a commonly acceptable definition of "access" in the Republic of South Africa ("RSA"). The next logical approach would be to take guidance from international instruments, bearing in mind that each country is expected to implement its own definition of "access", taking into consideration its own peculiar economic circumstances. In one of its conference documents the International Telecommunications Union ("the ITU") defines "access" as *"a percentage of the population* ***covered by*** *either* ***fixed telephones lines, mobile telephony*** *or the percentage of localities with* ***public internet access*** *centres by number of inhabitants"*[1].

3.9 In the absence of a commonly acceptable definition of "access" within the RSA, we first will have to discern from the plain reading of the words used in the definition what the Authority had intended to be the meaning of "access" at the time of issue of the Cell C licence.

3.10 It is apparent from a plain reading of the definition that "access" was in this instance given a *sui generis* meaning with no regard to acceptable definitions such as that of the ITU. It is confined only to fixed line penetration. Therefore, the Authority proposes that "access" in this instance be interpreted to mean the ability of the inhabitants of an area i.e. city, town, shanty town, etc or any part thereof to reach and/or use a house telephone or public pay telephone.

Question 4.: Do you agree with the Authority's definition of access?

3.11 **"21 June 2001"** - In order to establish the exact number of inhabitants of an area that had access to PSTS lines at the time that the licence was issued (21 June 2001), the best evidence could be the census produced by Statistics SA as at the date the licence was issued ***or*** Telkom's records as at 21 June 2001 reflecting fixed line penetration in respect of each relevant area. The Statistics SA data is from October 2001 and not 21 June 2001

[1] ITU, Second Workshop on Information Society Measurement for Latin America and the Caribbean Santo Domingo, Dominican Republic 20-21 October 2005: *Core set of indicators: Basic access and Infrastructure.*

as contemplated in the definition. Nevertheless this is the closest data set to 21 June 2001. The Authority accepts that there cannot have been a significant change in fixed line penetration between 21 June 2001 and October 2001. Therefore, the Authority will in this regard rely on the 2001 Census Report as it remains the only reliable source of data.

3.12 **Statistics SA 2001 Census** - The 2001 census included:

- Every person, young or old in South Africa on census night (9 – 10 October); in the household where s/he spent the night.
- Babies born before midnight between 9 – 10 October and household members who died after midnight between 9 – 10 October 2001
- Members of the household who are absent overnight, for example, working, or travelling or at an entertainment venue, if they return to it the next day, i.e. 10 October 2001.
- Persons who stayed in institutions on census night were counted in those places.

3.13 The census also gathered data on:

a. Telephone in dwelling and cell phone
b. Telephone in dwelling only
c. Cell phone only
d. At a neighbour nearby
e. At a public telephone nearby
f. At another location nearby
g. At another location, not nearby

3.14 The calculation for access to a fixed line phone in a dwelling must therefore incorporate two data sets from the census. The first is the telephone in dwelling and cell phone (point (a) in section 3.4.9) and the second is telephone in dwelling only (point (b) in section 3.4.9). These two sets of data are mutually exclusive. For example, a respondent cannot answer 'yes' to both point (a) and (b), but only 'yes' to either point (a) or (b). This means that an accurate representation of the fixed line teledensity to the home in a particular area must include both point (a) and (b).

Question 6: Do you agree that the Authority may rely on the October 2001 census data?

3.15 **Public Pay Phone Data** - The next question that needs to be answered is the availability of public payphone data. The Authority is advised that the Telkom data is only kept by magisterial districts. It does not refer to specific areas as would be required by the definition and is accordingly not of much assistance.

3.16 The Authority also recognises that there is a difficulty in the public payphone data provided by Stats SA data in that it does not identify the area in which a respondent may have accessed a public payphone. In other words, was the payphone accessed at home, work, a place of entertainment or some other remote location that the respondent does not ordinarily pass by in his/her daily activities?

3.17 In these circumstances, in order to get a reasonable estimation of public payphone penetration per area, analysis may have to be done on the Telkom magisterial district data, using a methodology called small area estimation technique, to extrapolate an estimation of public payphone penetration per area. However, this too may not be an accurate measurement system. Therefore, the Authority proposes to leave out any data pertaining to public payphone penetration per area on account of lack of reliable data.

Question 5: Do you agree that in the absence of reliable data on public payphone penetration, all reference relating thereto should be excluded?

- **"and" necessary to roll CSTs to address....."**

3.18 **the conjunction "and"** (in this instance) creates an additional, but not an alternative category. In other words, the conjunction "and" cannot be read to mean "or" as contended by Cell C. In addition, the criteria set after the conjunction "and" cannot be applied independently from the criteria preceding it in the definition as is more fully set out in the paragraphs above.

3.19 another key word retained in respect of the component above is "necessary". It is not clear as to what facts should be taken into account in order to establish such necessity. However, whether or not the reasons advanced by Cell C in support of its compliance with this aspect of the definition are acceptable to the Authority shall be a question of whether or not such reasons can be objectively justified by Cell C.

- **"..... geographical disparities through proportional distribution of CSTs"**

3.20 "the geographical disparity" is also not defined, but should in this instance be interpreted to mean increasing in a balanced manner access to telephony in geographical areas where access to telecommunications was inadequate or non-existent, thereby reducing geographical inequality in terms of access to telephony services in such areas.

3.21 the proportional distribution of CSTs should be interpreted to mean that the roll out of CSTs should not be concentrated in one geographical area, but there should be a balance in the deployment of CSTs in areas that are under serviced.

- **"Excluding areas in territories that are listed in Annexure A2"**

3.22 It is apparent that no such listing exists and any inclusion of the list at this stage shall not have any retrospective effect. It is also accepted that although inclusion of the list would have assisted in the identification of USAs, its omission does not per se render the definition invalid and/or incapable of implementation.

Question 6: Do you agree with the Authority's interpretation of Section 3.18 – 3.22?

Question 7: Is there any other relevant issue that should be taken into account by the Authority in the interpretation and application of the definition?

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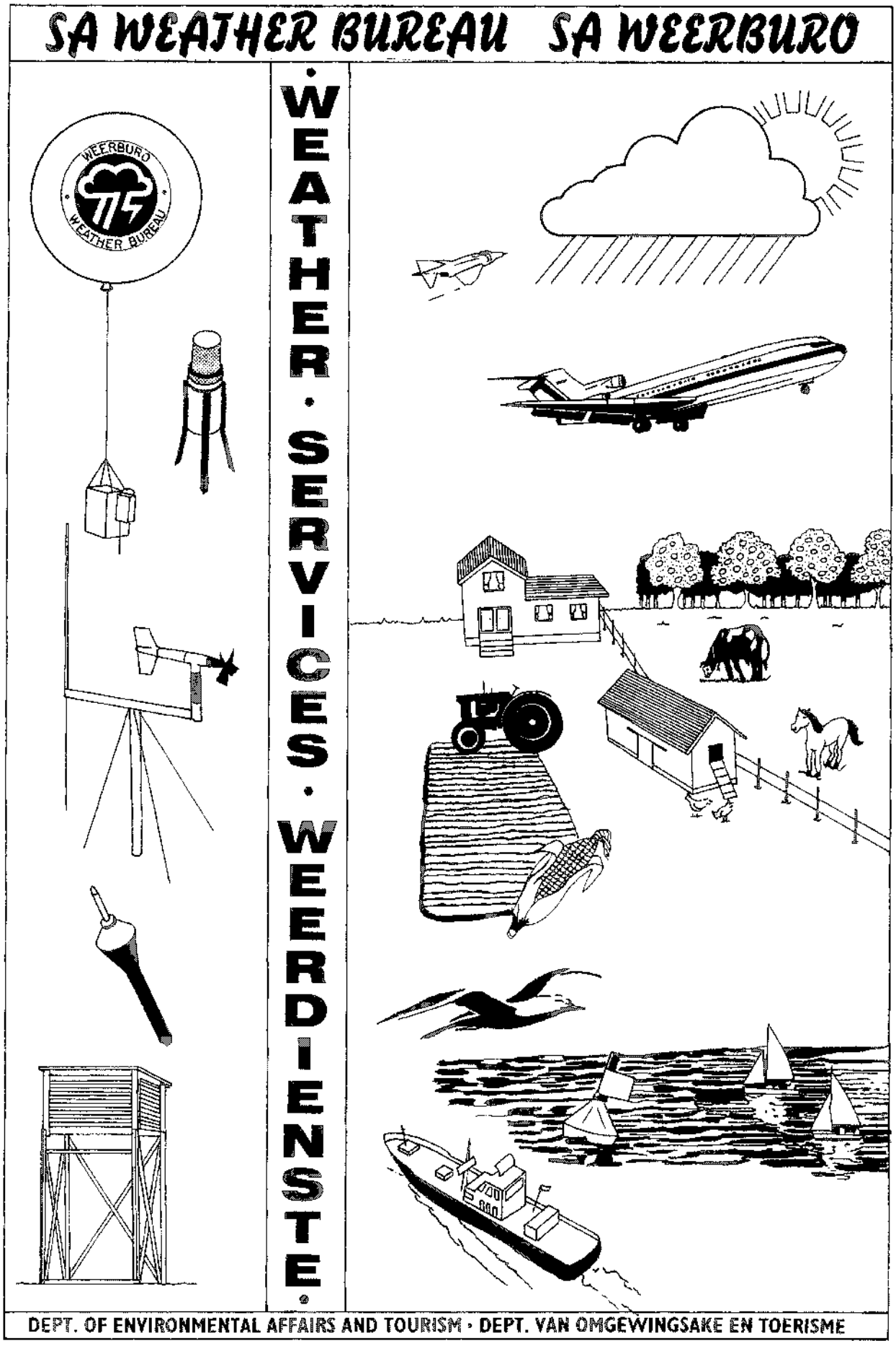
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