CELL C'S WRITTEN RESPONSE

DRAFT CALL TERMINATION REGULATIONS, 2013

Gazette 36919 of 11 October 2013

RESPONSE TO ICASA ON THE DRAFT CALL TERMINATION REGULATIONS, 2013

Contents

Glossary of terms used in this submission

2010 Call Termination Regulations	the Call Termination Regulations published by ICASA on 29 October 2010
Cell C	Cell C (Pty) Ltd
Draft Regulations	the draft 2013 call termination regulations to which Cell C is responding
ECA	Electronic Communications Act, 2005
efficient operator	economies of scale are the cost advantages that enterprises (such as network operators) obtain due to size, throughput, or scale of operation, with cost per unit of output generally decreasing with increasing scale as fixed costs are spread out over more units of output; often operational efficiency is also greater with increasing scale, leading to lower variable cost as well
explanatory notes	the ICASA notes accompanying the publication of the 2010 Call Termination Regulations
HHI	Herfindahl–Hirschman Index, a measure of the size of firms in relation to an industry and an indicator of the level of competition among them
LRIC	Long Run Incremental Cost, a methodology for calculating forward-looking costs that can be accounted for, often used to determine costs payable by a challenger operator to a dominant operator
MTN	MTN (Pty) Ltd
MTR	mobile termination rate
PAJA	Promotion of Administrative Justice Act, 2000
revenue	revenue from licensed services (the same measure as that on which the calculation of licence fees is based)
scale	the relative size or extent of an enterprise that indicates bargaining power (which Cell C submits should be a proxy of revenue market share in excess of 25%)
SMP	significant market power as defined in the ECA
Telkom Mobile	the mobile business unit of Telkom SA SOC Ltd – we include their financial information on the basis of the financials of their parent company
Telkom	Telkom SA SOC Ltd
Vodacom	Vodacom (Pty) Ltd

1 Cell C is suggesting some improvements to the Draft Regulations

1.1 Cell C applauds ICASA for the pro-competitive stance it has signaled in the Draft Regulations. Cell C is also grateful for this further opportunity to address ICASA on the critical issues of MTRs and asymmetry.

1.2 However, Cell C remains concerned that the level of remedies proposed by ICASA is not sufficient and that the arguments advanced by Cell C in its two previous submissions (2 August and 11 September 2013) and in the course of the last 18 months' of correspondence with ICASA, have not been taken into account to the extent necessary to correct the skewed market in which Cell C is required to compete. Our previous submissions are attached to this submission as *Annexures* E and F.

1.3 As indicated in our previous submissions, Cell C believes that the following remedies are not only appropriate in the circumstances, but pro-competitive, proportionate and necessary (as required by section 67(7), and urges ICASA to reconsider the draft Regulation in the terms set out here:

1.3.1 Asymmetry in favour of challenger operators at an absolute amount which is independent of the level at which MTRs is set;

1.3.2 Asymmetry should remain constant and in place until such time as smaller operators achieve scale, which would require that that challenger operators achieve scale, in other words, a revenue market share of 25%. To ensure that this is achieved, a further market review should be carried out to determine whether minimum scale has been achieved or not;

1.3.2 Cell C considers that asymmetry at an absolute level of R0.30 would be appropriate for all the reasons outlined in our previous submissions, and as set out in this further written submission;

1.3.3 A reduction in the MTRs of the incumbent operators (MTN and Vodacom) is required so as to give effect to the asymmetric rate proposed;

1.3.4 A further reduction in the fixed termination rates to a single blended rate with no "reverse" fixed/mobile asymmetry is recommended (in other words, we support fixed/mobile symmetry in the future rather than, as currently phrased, fixed termination rates exceeding MTRs); and

1.3.5 To the extent possible in the context of a review of the wholesale market, the retail prices of each of MTN and Vodacom should not be less than the level of the regulated MTR. This would be in the interests of prohibiting discrimination in relation to matters connected with

access, provisioning of services, interconnection and facilities-leasing, and as set out in section 67(7)(c).

1.4 Cell C also submits that ICASA should publish the final Call Termination Regulations, 2013, as amended, without further delay:

1.4.1 There has already been significant delay in carrying out the review of remedies, which was anticipated to have been completed by 25 October 2013;

1.4.2 There has been no further intimation from ICASA that any other steps are required in order to complete the Regulations, such as a public hearing;

1.4.3 A public hearing in the circumstances would serve only to draw the process out, given that ICASA has already allowed two sets of written submissions to be made by interested parties, and also held various one on one meetings with individual licensees and other interested parties; and there is no obligation in the ECA or other regulations that requires any public hearing. Furthermore, it would not be a requirement under PAJA, since adequate opportunity has been given to all licensees since the launch of the review on 10 June 2013, to prepare and to respond to ICASA's process and the draft Call Termination Regulations;

1.4.4 Regulatory certainty enables structural certainty. This is particularly important for challenger networks whose support from shareholders and investors depends on achieving forecasted returns; and

1.4.5 In order for licensees to finalise their 2014 budgets, adequate time should be allowed prior to implementation of the final Regulations on 1 March 2014. In our view, at least 2-3 months would be reasonable in the circumstances. It is also well-known that summer holidays typically result in a slow-down in business activity during December, which would mean that the final Regulations should be made available as early as possible in December 2013.

2 A brief summary of the competitive landscape in which Cell C operates

2.1 As ICASA will be aware, and as set out in our previous submissions, Cell C has had to operate largely without regulatory intervention since launch. Despite a skewed market, Cell C has not benefited from regulatory support such as the making and enforcing of regulations such as mobile number portability, essential facilities, facilities-leasing, or price regulation, until 2010. The effect of regulatory assistance (or deemed assistance) is clearly visible in *Figure 1*, which reflects the benefit that Vodacom received from Telkom, following commencement of its operations, and which is still evident some 5 years after launch.

Figure 1: Estimated benefit of fixed / mobile asymmetry to Vodacom from Telkom
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2.2 It is clear that the asymmetry benefit for Vodacom was greatest in the earlier years while Telkom traffic was still significant. In the 1999 financial year, approximately 71% of the Vodacom EBITDA was as a result of payments from Telkom flowing from the mobile / fixed asymmetry favouring Vodacom over Telkom, and prior to this year the figure was even higher. It should be noted that the benefit was also significantly higher during Vodacom's start-up phase, from 1994 to 1998 when Telkom was the dominant incumbent in terms of revenue, traffic and subscribers (unfortunately no public data is available during this period to illustrate this).

2.3 This benefit is even more significant in absolute terms and we estimated that the net EBITDA impact on Vodacom of this fixed / mobile asymmetry of ~R1.00 is approximately R29bn for the financial years 1999 till 2012. It should be noted that this amount excludes the absolute benefit received during the start-up phase from 1994 till 1998 and hence this benefit clearly entrenched the incumbent's competitive position[1] before Cell C launched and till today, as indicated in *Figure 2*.

Figure 2: Estimated benefit of fixed / mobile asymmetry to Cell C from Telkom
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[1] In an interview with Moneyweb on 18 November 2013, the current Telkom CEO, Sipho Maseko, confirmed this by saying "*In our view we want to achieve two things, firstly what needs to be achieved is that we're seeking parity between fixed termination rates and mobile termination rates and we seek that parity immediately, so there should be no glide path to parity, especially if you take into account the fact that these should have changed at least nine years ago. So R55bn, R60bn later into the big mobile operators we think that affording another three years or so of glide path will totally be unfair to Telkom……*"
[2] In an interview with Moneyweb on 18 November 2013, the current Telkom CEO, Sipho Maseko, confirmed this by saying "*In our view we want to achieve two things, firstly what needs to be achieved is that we're seeking parity between fixed termination rates and mobile termination rates and we seek that parity immediately, so there should be no glide path to parity, especially if you take into account the fact that these*

[redacted].

2.5 Our history shows that Cell C was significantly disadvantaged at launch, entering a market dominated by a duopoly in the mobile sector and a monopoly in the fixed sector. MTN and Vodacom had received government support on launch in the form of anchor accounts from government departments, access to sites and land, support for asymmetry as against Telkom, and clean 900MHz spectrum in contiguous bands. Cell C received no such support.

2.6 Today the facilities-leasing regulations are arguably not enforced nor is there any guidance in place from ICASA on the interpretation and application of the RIO obligations contained in the 2010 Call Termination Obligations. Absent a complaint regarding a request for facilities being brought by Cell C, ICASA has not intervened in this area, or monitored the effectiveness of these regulations.

2.7 In the 2010 Call Termination Regulations, ICASA had planned to introduce a cost accounting remedy applicable to Vodacom, MTN and Telkom. If it had been implemented, Cell C believes that ICASA would be in a better position to understand how operators earn profits on wholesale and retail activities and therefore that ICASA would understand Cell C's request in the broader context of competition for wholesale and retail mobile services.

2.8 Despite several approaches by Cell C, ICASA has also failed to review the mobile Number Portability Regulations of 2005 – which were introduced under the former and now repealed Telecommunications Act of 1996. The restrictions on marketing of porting, the limitations on the time that ports may take place, and the technical constraints claimed by the Number Portability Company and the incumbents, when combined, create a toxic mixture of obstacles to Cell C, Telkom Mobile and any new entrant gaining real market share in a saturated market. In a saturated market, porting customers away from the incumbents is obviously the only real option to grow our subscriber base.

2.9 Even so, higher subscriber numbers will not sustain competition in general, or Cell C in particular without wholesale price regulation.

2.10 To this end, Cell C has also launched a complaint with the Competition Commission ("the Commission") against MTN and Vodacom, based on section 8 of the Competition Act, 1998. This section deals with the abuse of dominance. Cell C's complaint is based on two forms of

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abuse – excessive pricing, and margin squeeze. Supported by the work of Econex (economic experts), Analysys Mason (international regulatory experts), and Werksmans attorneys, Cell C has suggested that ICASA exercise its concurrent jurisdiction arrangements to liaise with the Commission, and we are advised that certain of ICASA's staff have signed confidentiality agreements and been provided with copies of the complaint. No ICASA councilor has yet signed a confidentiality agreement, but obviously once they have done so, then the complaint can also be shared with councilors.

2.11 The essence of the complaint is that MTN and Vodacom have used differential pricing in their on-net and off-net packages to customers, to ensure that customers are "locked-in" to their networks by the promise of a beneficial on-net rate, preventing switching of these customers to competing networks like Cell C. Because the pricing of the on-net and off-net offerings is not transparent, the effective rate charged by the incumbents had to be determined with reference to publicly available data and the marketing materials of the incumbents.

2.12 Based on the available data, it is Cell C's informed view that the prices actually charged for on-net calls are so much lower than the off-net prices of the incumbents that the off-net prices must be regarded as excessive. In addition, the level to which on-net prices appear to drop suggest that the margins achieved by the incumbents are too small to allow Cell C to compete, given that it must cover the termination rate to these operators to terminate calls to their networks.

2.13 Furthermore, and interestingly, in the last 12 months, we have seen a number of cases around the world (France, Nigeria and Papua New Guinea) in particular, but also a general trend to regulating on-net off-net pricing differentials. The cases have found them to be in general, anti-competitive, having the effect of locking in customers to a "community" or "club", and preventing switching to smaller challenger networks because of the price advantages of on-net calls. The literature has been presented in summary form to the Commission along with the complaint.

2.14 Cell C has had to act on its own in order to protect its position in the retail market. Cell C has asked the Commission to consider an order prohibiting Vodacom and MTN from differentiating between the price of on-net and off-net calls would have a generally positive impact on competition in the market.

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Cell C has been operating in and continues to operate in a skewed market. Without regulatory intervention by ICASA in the manner set out above, Cell C does not believe prices will come down significantly and MTN and Vodacom's duopoly will be further entrenched which may result in Cell C exiting the market.

3 The need for continued and enhanced asymmetry

3.1 Asymmetry as a pro-competitive remedy

3.1.1 Cell C considers it likely that Vodacom and MTN will argue that no further asymmetry should be afforded to Cell C, despite the continued deep divide in the respective subscriber market shares of the parties (83%:17%) and revenue market shares (90%:10%). As set out in our previous two submissions, Cell C has requested ICASA to consider a pro-competitive remedy in the form of asymmetry which will consist in an additional benefit.

3.1.2 Asymmetry, as we have discussed in our submissions, is a critical pro-competitive remedy to ensure sustainable competition and real benefits for consumers. The level of asymmetry proposed by ICASA in the draft 2013 Call Termination Regulations is not so great or so out of step with international best practice that it would be regarded as extraordinary.

3.1.3 In any case, it is Cell C's view that extraordinary measures are called for to address the historical imbalance in the market – still in place as indicated by the high level of HHIs, confirmed by ICASA, and to redress the historical lack of regulation in this important sector as set out in *Annexure A.*

3.1.4 Unless Cell C can distinguish itself and its offerings from the attractive and low on-net prices offered by MTN and Vodacom (which are the subject of our Commission complaint), it cannot compete sustainably or so as to attract customers away from the larger operators. Unless Cell C can grow market share and truly compete with MTN and Vodacom, its business is not sustainable.

3.1.5 It is important in this context to note that MTN and Vodacom are buying termination from Cell C but have countervailing buying power, therefore unilateral changes by them in prices (price reductions to consumers) are not likely to take place without regulatory inducements and real competitive pressure from Cell C and other challenger networks.

3.1.6 ICASA noted at section 3.1(3) of the explanatory notes that it expected "*feed-through impact [of the Regulations] to be…(a) a greater number of licensees considering entering the retail voice services market; and (b) an increase in volumes of traffic between networks*". No other licensees have entered the market to our knowledge, and there has been no increase in traffic as set out above, to Cell C. In fact, Cell C data shows a decline in the minutes of use from Vodacom to Cell C during the relevant period (2010-2012) and flat minutes of use from MTN to Cell C during the same period.

3.1.7 Despite the efforts made by Cell C to compete, as will be seen from our previous submissions, our subscriber base remains far smaller than the subscriber bases of our competitors. More specifically, the current MTRs (which are not cost-based or cost-oriented) and the level of on-net/ off-net price discrimination that prevails, have meant that a reduction in Cell C's tariffs (the "99c for real" offer), have had a net negative effect on Cell C, which means that the previous drop in MTRs has not had the effect on Cell C's bottom line that was expected by ICASA.

3.1.8 It is also relevant to note that as Cell C carries only around 12%[3] of total terminating traffic (while the incumbents carry the balance of 88%), applying a termination rate plus asymmetry to only 12% of the total terminating traffic in the market would be a proportionate remedy in that it will have a relatively minor negative effect compared to the benefits that can be accrued by the subscriber base as a whole, from improved competition and prices.

3.1.9 ICASA must consider the trade-off between the static "efficiency" of having a small number (2) of large players and the dynamic efficiency of having more (3 or 4) players in the market competing to offer better prices and services over the longer term.

3.1.10 The inevitable conclusion one must draw is that competition in the relevant market continues to be ineffective as Cell C cannot compete with the large-scale incumbents. Other problems in the market caused by Vodacom and MTN such as on-net off-net price discrimination, make it more difficult for Cell C to grow its market share by, for example, churning customers from the current incumbent players. This will lead to a market failure which neither ICASA nor Government would want to be associated with.

3.1.11 Because of Cell C's low share of traffic, our unit costs are significantly higher than those of each of MTN and Vodacom. If MTRs are derived from true cost, then it would follow that Cell C should have higher MTRs to compensate for its higher costs.

[3] These are Cell C estimates as at the end of December 2012, based on published public data and an approximation for MTN data. However, for 2013 this share is likely to be lower, due to the change in Cell C's traffic profile (in becoming a net sender to the mobile incumbents) as from Q3/4 2012 till today.

3.1.12 Scale is tremendously important when attempting to compete in the mobile electronic communications market. A new entrant's total investments and a large part of its total operating costs will be the same as existing operators. Suffice to say that without scale, an operator is not able to operate efficiently because its unit costs of traffic are too high.

3.1.12.1 The Vodacom CEO agrees with this statement, and recently confirmed in a Vodacom webinar commenting on the Vodacom interim results on 13 November 2013, that Cell C should invest the same amount as Vodacom (ie R7 billion per annum) in order to be competitive.

3.1.12.2 The MTN CEO (at the time Phuthuma Nhleko) also agrees that scale is important, commenting in the March 2010 Group Chair and CEO report that "*MTN's strategy is to leverage the brand and already widespread presence to achieve sustained growth and more operational efficiencies. In his report on page 26, the chief operating officer details Group initiatives to standardise equipment and processes, and simplify and centralise functions. Among these are successful efforts to leverage the Group's scale to secure more competitive pricing from vendors, the number of which MTN continues to rationalise without sacrificing competition."*

3.1.12.3 More recently MTN's current CEO, Zunaid Bulbulia, was reported in ITNews Africa on 10 October 2013 saying that *"Market performance in the EU is being hampered by the inability of operators to exploit economies of scale and scope, thereby slowing network deployment, impeding innovation, and harming consumer welfare*," On 25 April 2013, in Business Day Live, the MTN Group's then chief mergers and acquisitions officer, Khumo Shuenyane, stated that "*It is difficult to compete in this industry if you don't have scale, not least because it is harder to negotiate price with equipment suppliers*."

3.1.13 Cell C submits that the period and level of asymmetry was not enough to bring about material changes in relative positions that strengthen the competitive pressure that challenger operators are able to bring to bear on larger players. Cell C has not been able to increase its scale significantly since the introduction of the 2010 Call Termination Regulations.

Cell C requires a pro-competitive remedy in the form of increased absolute asymmetry until it achieves scale, in order to ensure that it can compete in a sustainable manner, and to compensate it for the lack of regulatory intervention since launch, in the face of ever-increasing dominance by MTN and Vodacom.

3.2 Asymmetry does not need to be purely cost-based

3.2.1 It is possible that MTN and Vodacom will argue that any asymmetry should be only "cost-based". We have considered the legal position in other countries and particularly in those countries that can be said to be leaders in regulation, from whom MTN and Vodacom also source their benchmarks. The summary of our findings[4] is attached as *Annexure C*.

3.2.2 It is clear that far from basing asymmetry only or mainly on cost as the SMP incumbents are likely to content, it should be set at a level that enables challenger operators to compete. In our view this level is inextricably linked to the need to achieve minimum revenue market share or scale. It is also relevant to note that the first set of MTRs in the 2010 Call Termination Regulations were intended to approach cost and were termed "cost-oriented", but the level of asymmetry was not regarded as having anything to do with cost.

3.2.3 As we highlighted in our August 2013 submission, one of the issues to take into account in considering whether there has been market failure (as is also captured in the 2010 ICASA March Guidelines) is access to capital markets:

3.2.3.1 Arguably Cell C's competitors have easier or more privileged access to capital markets and financial resources, and a large amount of cash available on their balance sheets.

3.2.3.2 This is because smaller challenger operators with less attractive balance sheets (higher costs and lower revenues because of lack of scale) are considered to be higher risk.

3.2.3.3 This being the case, affording asymmetry to challenger operators that is only or mainly intended to approximate the difference in their costs from those of the SMP incumbent operators would not help Cell C to attract investment.

3.2.3.4 Cell C only has price to use as a competitive tool, therefore to be sustainable we need to be able to derive a reasonable margin from the sale of services to grow the business.

3.2.4 As set out in our previous submissions to ICASA, although the asymmetric MTRs under the 2010 Call Termination Regulations were aimed at providing growth opportunities to the smaller operators, it is clear from this data that the revenue market share of Cell C has in fact declined. While there might be other factors that contribute to market share and growth, these figures provide a reasonable indication that the market has not become more dynamic as a result of mildly asymmetric MTRs.

3.2.5 More evidence of the level of asymmetry present in other benchmarks and the reasons for the choice of asymmetry is presented in *Annexure B*. There are various reasons for affording an

[4] Research contributed by Analysys Mason.

operator asymmetry – there is no "right" level nor is there a "right" reason. Factors such as spectrum deficiencies, issues affecting market structure (which could include regulation or the absence of it), or late entrance, are usually cited as reasons for regulatory authorities to implement asymmetry.

3.2.6 Cell C notes that in addition, mobile penetration is effectively saturated – Cell C cannot increase its scale by adding many non-subscribers (consumers that do not yet have a mobile phone) to the mobile community as there are not many non-subscribers left. So in this situation, Cell C must grow by competing directly for customers already in a relationship with Vodacom and MTN. This means that the focus of competition needs to be offering call prices (on-net and off-net, or any-network, or larger subscription bundles) which are more affordable than their current prices.

3.2.7 As we have explained above, competing for existing subscribers is extremely difficult within the current market structure, and will be as difficult if asymmetry is not properly regarded as a pro-competitive remedy, designed precisely to ensure that smaller challenger networks are given a boost to enable them to compete. The past 3 years of price regulation have shown that this is necessary, in fact that it is crucial for real and sustainable competition.

Asymmetry is a pro-competitive remedy. Therefore there is no reason in law or economics that it should be based only on cost. ICASA should recognise that there are numerous other factors that should be taken into account in determining asymmetry.

3.3 The level of asymmetry should be constant and wider

3.3.1 The highest proposed level of asymmetry contained in the Draft Regulations (i.e. the year one asymmetry of R0.19) will have a very limited effect on MTN and Vodacom. This is shown in *Figure 3*[5] below

Figure 3: Net impact on EBITDA per operator for the latest reported FY (in ZARm)

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[5] **Source**: Vodacom annual report, SA results; MTN annual report, SA results; Telkom annual report, Group results; Cell C SA results; No reported EBITDA numbers are available for the Other Operators category and this category consists of Neotel, VOIP operators and inbound international traffic.
Note: The figure below calculates the net EBITDA impact of the first year's proposed voice call termination rates as per the Draft Regulations on all market players. Therefore, it calculates the impact of the highest proposed level of asymmetry (i.e. R0.19 for year one) on the current reported last financial year EBITDA levels for each operator where applicable.

3.3.2 In the table below we have set out the detailed (net) impact on EBITDA (as measured against the R0.40 mobile voice call termination rates with no additional asymmetry) per traffic destination based on the total impact as illustrated in *Figure 3* above. It should be noted that the traffic volumes are based on reported total interconnect traffic figures for the 2012 / 2013 financial years and the profile of the traffic destinations are reasonable estimates based on market shares and Cell C traffic profiles. All traffic figures between Cell C and the mobile and fixed SMP incumbents were updated with annualised 2013 traffic (due to the significant change in the traffic profile over the last 12 months between Cell C and these incumbents).

	Vodacom SA annual impact ZARm	MTN SA annual impact ZARm
Reduction in SMP MTR of R0.20*	-910	-911
Reduction in smaller operator MTR (Cell C & Telkom Mobile traffic) of 20c	-269	-245
Reduction in other operators (primarily inbound international traffic) MTR of R0.20	-297	-233
Reduction in Fixed (incoming traffic) MTR of R0.20	-383	-282
Total reduction in interconnect revenue	**-1,859**	**-1,670**
Reduction in SMP MTR of R0.20*	911	910
Reduction in small operator MTR of R0.01 (i.e. therefore compared to R0.40)**	10	9
No change in fixed termination rate		
Total reduction in interconnect costs	**921**	**919**
Total net EBITDA impact	**-938**	**-751**
Latest reported EBITDA	22,408[1]	14,478[2]
Latest reported EBITDA margin	38.2%	35.0%
Impact on EBITDA margin	-1.6%	-1.8%
* Vodacom-MTN traffic **If non-SMP MTRs were assumed to be R0.44 then this	[1] March 2013	[2] Dec 2012

cost saving would have been 4 times higher for both Vodacom and MTN		

3.3.3 [redacted]:

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[redacted]	[redacted]	[redacted]

Note: The numbers for the net impact on EBITDA are rounded up and as a result small differences, due to rounding, might occur between detailed numbers and total numbers.

3.3.4 The figures above are reasonable estimates and would be mitigated or altered by action in the competitive market – after the previous decline in SMP MTR's, the mobile SMP operators actually managed to *improve* their EBITDA margins.

The tables clearly illustrate that the net impact on EBITDA of the Draft Regulations on the incumbent SMP operators is not that large in relative or absolute terms given their current financial position, specifically their absolute and relative EBITDA numbers and their available

Free Cash Flows for future re-investments and/or debt-repayments and/or shareholder distributions (in the form of dividends).

3.3.5 *Figure 4*[6] further demonstrates the effect of the level of asymmetry proposed in the Draft Regulations on the net EBITDA of Cell C is not sufficient to remove the risk that Cell C's business will not be sustainable.

[redacted]

Figure 4: Net EBITDA impact over the glide path period on Cell C (in ZARm and ZAR cents)
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3.3.7 Cell C indicated to ICASA in its one on one meeting on 6 November 2013, that in fact Cell C (and Telkom Mobile) requires a greater absolute asymmetry. Cell C believes the absolute rate of asymmetry should be set at R0.30 which is the level of asymmetry that has been consistently put to ICASA in the recent past. *Figure 5* demonstrates such a proposed asymmetry linked to the mobile SMP MTRs and the fixed termination rates of the fixed SMP operator (based on a blended single rate of R0.10).

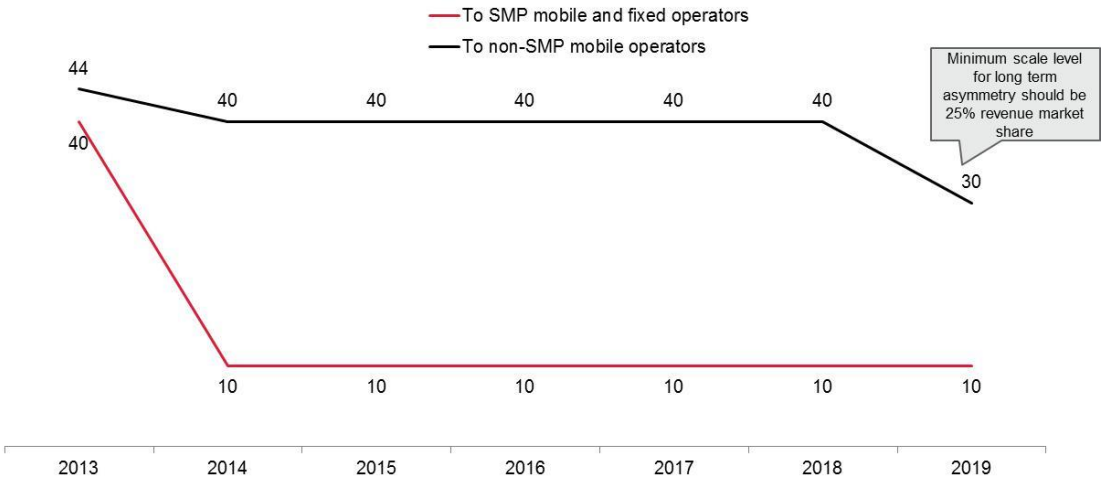

Figure 5: Proposed level of asymmetry required to establish a sustainable business (in ZAR cents)

[6] The figure calculates the Net EBITDA impact for year one on the same basis as Figure 3 and applies the same methodology for the remaining years, therefore it multiplies the annualised 2013 interconnect traffic estimates with the respective proposed MTRs and asymmetry margins for each year. The traffic estimates would be mitigated or altered by action in the competitive market.

3.3.8 We say this for a number of reasons, as set out in our second submission to ICASA in August 2013 where we indicated that asymmetry was not set at any particular level or for any particular reasons, but dependent on each country's own circumstances:

3.3.8.1 Out of 27 countries benchmarked, only 3 had low levels of asymmetry comparable to that of Cell C;

3.3.8.2 4 of these operators received significantly higher asymmetry than Cell C may receive under the Draft Regulations, even though their market share was in fact far higher than that of Cell C;

3.3.8.3 There is a concentration of situations where operators with around 15% or 20% market share have received considerable levels of asymmetry, in many cases much higher than that afforded to Cell C and for many more years (e.g. in Italy, France, Switzerland, Ireland, Morocco, Turkey, Algeria);

3.3.8.4 For some operators, a comparable or higher degree of asymmetry has been allowed at much larger scale than Cell C, around 25% to 35% market share;

3.3.8.5 It is well recognised that the absolute (and in some cases percentage) levels of asymmetry applying to smaller operators has been declining over time in other countries, although numerous operators are still receiving asymmetric termination rates today. This decline has come about through generally reducing mobile service costs and decisions by regulators to moderate the level of asymmetry on a glide path or other mechanism towards symmetry. However, in our sample of countries, asymmetric termination rates were on average more than twice the level in South Africa at the commencement of asymmetry, and for those countries still applying asymmetry today, the level of asymmetry is three times that applied in South Africa today (these benchmarks were included in our second submission to ICASA);

3.3.8.6 It should be noted, however, that ICASA's decision on asymmetry has been recognised as being different from many other nations – Cell C did not benefit from asymmetry from launch (only 10 years after it launched) and only by regulatory decision (rather than by setting its own rate).

3.3.9 The proposed rate of asymmetry does not deliver an internal rate of return (IRR) that enables true competition in as short a timeframe as is possible – and Cell C has a number of years to catch up on. The IRR or economic rate of return is the measure by which one can compare the profitability of various investments. A higher rate of return is more likely to interest investors, for obvious reasons – the project with a high IRR is likely to result in higher growth. A low IRR therefore prejudices Cell C in its requests for funding, which as we discussed in our previous submissions, is already difficult, given the balance of power in the market and Cell C's inability to sustain itself without continual support from its shareholders.

3.3.9.1 Smaller companies, later entrants and businesses yet to demonstrate a reliable stream of EBITDA can present greater risks to investors than established incumbents. Although regulators have tended to apply the same cost of capital to a single regulated sector (e.g. imposing symmetry, in that the choice of funding structure is the choice of the operator), Cell C submits that it faces a higher cost of capital than its larger, more profitable competitors.

3.3.10 The proposed increase in asymmetry may well appear to be significant in percentage terms, but in fact the impact of such an increase on Cell C and on its competitors, respectively, is not significant, as *Figure 6*[7] demonstrates.

Figure 6: Net EBITDA impact per operator for the latest reported FY (in ZARm)
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3.3.11 In the table below we have set out the detailed net EBITDA impact (as measured against the R0.40 mobile voice call termination rates with no additional asymmetry) per traffic destination based on the total impact as illustrated in *Figure 6* above. The traffic volumes are based on reported total interconnect traffic figures for the 2012 / 2013 financial years and the profile of the traffic destinations are reasonable estimates based on market shares and Cell C traffic profiles. All traffic figures between Cell C and the mobile and fixed SMP incumbents were updated with annualised 2013 traffic (due to the significant change in the traffic profile over the last 12 months between Cell C and these incumbents).

3.3.12 The detailed net EBITDA impact on the mobile SMP operators is reflected in the tables below:

	Vodacom SA annual impact ZARm	MTN SA annual impact ZARm
Reduction in SMP MTR of R0.30*	-1,365	R
Reduction in smaller operator MTR (Cell C & Telkom Mobile traffic) of R0.30	-404	-367
Reduction in other operators (primarily inbound international traffic) MTR of R0.30	-445	-349
Reduction in fixed (incoming traffic) MTR of R0.30	-575	-423

[7] **Source**: Vodacom annual report, SA results; MTN annual report, SA results; Telkom annual report, Group results; Cell C SA results; No reported EBITDA numbers are available for the Other Operators category and this category consists of Neotel, VOIP operators and inbound international traffic.
Note: The figure below calculates, as in the case of Figure 3, the net EBITDA impact of Cell C's proposed voice call termination rates for year one only based on the required absolute asymmetry of R0.30 per year on all market players. Therefore, it calculates the impact of the proposed level of asymmetry (i.e. R0.30 from year one) on the current reported last financial year EBITDA figures for each operator where applicable.

Total reduction in interconnect revenue	**-2,788**	**-2,505**
Reduction in SMP MTR of R0.30*	1,366	1,365
Reduction in small operator MTR of R0.00 (i.e. therefore compared to R0.40)	0	0
Reduction in fixed termination rate of R0.04**	52	38
Total reduction in interconnect costs	**1,417**	**1,402**
Total net EBITDA impact	**-1,371**	**-1,102**
Latest reported EBITDA	22,408[1]	14,478[2]
Latest reported EBITDA margin	38.2%	35.0%
Impact on EBITDA margin	-2.3%	-2.7%
* Vodacom-MTN traffic **The assumed blended fixed termination rate is currently R0.14 based on Cell C estimates	[1] March 2013	[2] Dec 2012

3.3.13 [redacted]:

CONFIDENTIAL	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
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[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

[redacted]	[redacted]	[redacted]

Note: The numbers for the net EBITDA impact are rounded up and as a result small differences, due to rounding, might occur between detailed numbers and total numbers.

3.3.14 The figures above are reasonable estimates and would be mitigated or altered by action in the competitive market – after the previous decline in mobile SMP MTR's, the mobile SMP operators actually managed to *improve* their EBITDA margins.

3.3.15 This clearly illustrates that the net EBITDA impact of Cell C's proposed sustained asymmetry of R0.30 on the mobile SMP operators is still not that large in relative or absolute terms given their current financial position, specifically their absolute en relative EBITDA numbers and their available free cash flows for future re-investments and/or debt-repayments and/or shareholder distributions (in the form of dividends).

3.3.16 The impact of a constant asymmetric rate which applies in a sustained manner as proposed by Cell C, is however, similarly not significant in relation to the incumbents, but far more meaningful for Cell C, as indicated in *Figure 7*[8] below.

[redacted]

Figure 7: Net EBITDA impact over the glide path period on Cell C (in ZARm and ZAR cents)

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3.3.17 [redacted].

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3.3.18 Applying only a small <u>percentage</u> asymmetry to a reducing MTR becomes meaningless in practice because it becomes a smaller percentage of a smaller number – for example, affording challenger operators an asymmetry of 10% or even 20% on a low MTR would mean that the real difference for Cell C if the MTR for Vodacom/MTN were set at 20c, would be R0.02 or perhaps R0.04.

[8] The figure below calculates the Net EBITDA impact for year one on the same basis as Figure 3 and applies the same methodology for the remaining years, therefore it multiplies the annualised 2013 interconnect traffic estimates with the respective Cell C proposed MTRs and sustained asymmetry of R0.30 for each year. The traffic estimates would be mitigated or altered by action in the competitive market.

3.3.19 Extending or enhancing asymmetry as Cell C suggests necessarily implies that some operators will be "worse off" but others will be "better off". ICASA must consider, in the circumstances, what the situation will be beyond the direct effect in the short term, to the longer term benefits for consumers, and the relative characteristics of the "worse off" situation as we have described them above (namely the minimal reduction in super-normal profits over the short to medium term for the incumbents).

3.3.20 It is also important to note that the R0.30 that Cell C is suggesting should be maintained until Cell C achieves scale (as defined) including at least for the period proposed in the Draft Regulation, regardless of the MTR.

Cell C submits that it (and other challenger operators) should receive an absolute rate of asymmetry of R0.30 for the duration of the period of regulation proposed by ICASA but at least until reasonable scale is achieved, in order to ensure the sustainability of its business and that Cell C can truly compete with MTN and Vodacom and thus reduce the cost to communicate.

3.4 What Cell C can do with more asymmetry

3.4.1 Cell C can continue to improve the cost to communicate and offer value to consumers with more asymmetry. Cell C has already demonstrated this in our local and international services markets. Far from being a price-taker since the introduction of the 2010 Call Termination Regulations, Cell C has actually led the way in reducing prices and prepaid and postpaid rates that have converged after 16 years of disparity in the industry, as indicated in *Figure 8*[9]*and 9* below.

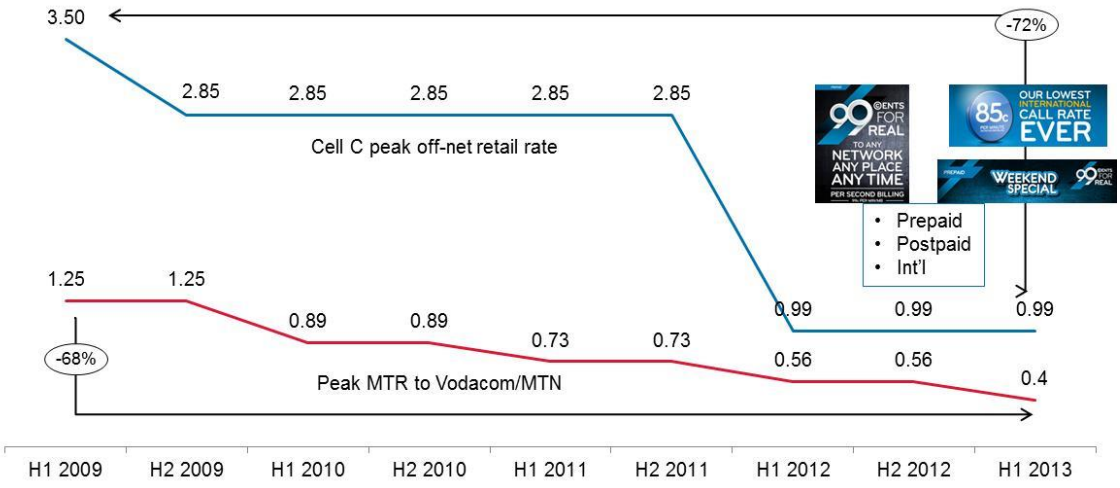

Figure 8: Cell C lodged prepaid peak off-net retail rate vs. peak MTR to Vodacom/MTN (in ZAR)

[9] Note: Based on the lowest priced per second billing tariffs

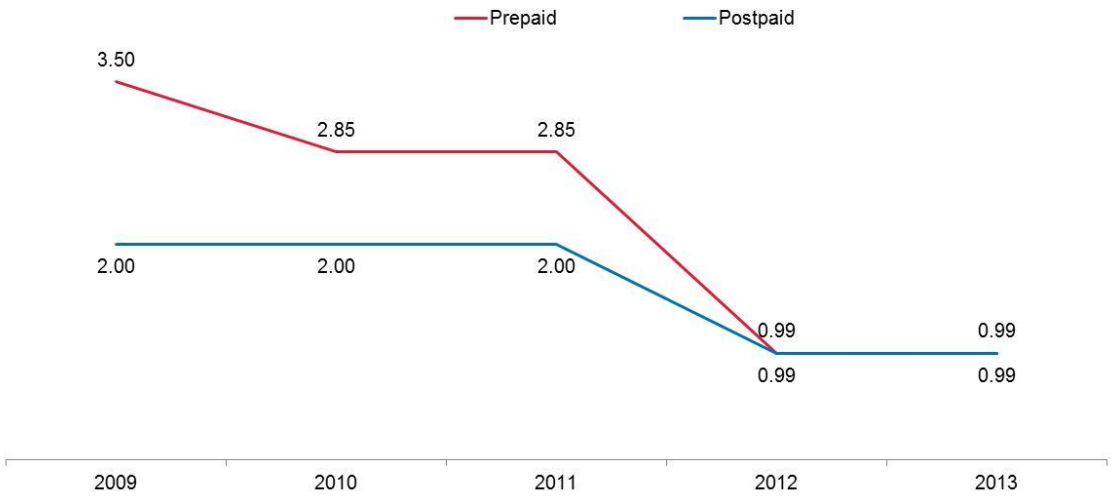

Figure 9: Cell C lodged prepaid vs. postpaid peak off-net retail rate (in ZAR)

3.4.1.1 Cell C reduced its retail prices with its drop in price to a flat rate of R0.99 in May 2012 (the same price applies whether a call is made on-net or off-net and whether in peak hours or off-peak hours), and had already dropped prices of certain packages in anticipation of the 2010 Call Termination Regulations, to R1.50.

3.4.1.2 When the cost of calling internationally was reduced by our roaming partners, Cell C immediately reduced the cost to make an international call – our international call rates are now cheaper than standard local call rates.

3.4.2 With its current aspirations to offer competitive services to the whole population, Cell C may not be sustainable in the long-term with only 10-15% market share. The high costs to enter and remain in the market (caused by the prerequisite national coverage of a reliable quality) mean that the minimum scale necessary in order to operate efficiently (e.g. with equipment well-utilised) is significantly larger than 10-15% market share. If Cell C exits the market because of this unsustainable position, then competition will be harmed, only to the benefit of larger operators and their shareholders.

3.4.3 If Cell C reduces its aspirations and remains at 10% market share, it will be required to scale back its operations accordingly and so is likely to have to offer lower quality and diversity of services, reduce staffing, etc. Becoming a 'second-class' mobile network will harm competition significantly and limit the beneficial effects of a third competing network in the country – Cell C would then not be in a position to offer diverse services to the majority of the population, meaning that large parts of the market become permanently captured by the two existing large operators Vodacom and MTN, effectively an entrenched duopoly.

3.4.4 In summary, without asymmetry it is not possible to continue to challenge the incumbent operators on price. Cell C's competitors obviously prefer that Cell C's ability to continue to disrupt the market should be extinguished but if this happens, the market will be stagnant at best, in terms of price, competition and the cost to communicate.

Cell C can continue to make inroads into MTN and Vodacom's dominance, address the high cost to communicate, and continue to offer reasonably priced services to consumers if it receives continued and increased asymmetry.

3.5 Using revenue market share or minutes to qualify for asymmetry

3.5.1 As Cell C explained in its one on one with ICASA, the application of the total share-of-minutes test as the threshold for qualification for asymmetry has some important contra-indications. Most significantly, the total share of minutes test does not accurately reflect the revenue of the operator concerned, or whether or not its network is being used efficiently.

3.5.2 Efficiency is not about traffic, it is about revenue and cost.

3.5.3 This is because the usage of each subscriber of the network could be low overall, which means that the economy of scale benefits to Cell C, for example, are also low. Many subscribers could be signed up simply by Cell C offering low prices, but they may not heavily use the network.

3.5.4 Cell C has acquired around 15% share of the total market for subscribers but has a lower share of revenues than do MTN and Vodacom. This indicates that its share of minutes is generated in general by a mixture of low-usage customers, low-spending or partial-usage (i.e. multi-SIM) customers.

3.5.5 Cell C has recently added a large number of subscribers while simultaneously churning (disconnecting) a similarly large customer base. This demonstrates that there are price sensitive and dynamic customers within the market – these customers are frequently moving between operators, trying new price plans, taking short-term offers, etc.

3.5.6 Competition imbalances are highlighted between the prepaid and postpaid segments of the market. Postpaid segments expect seamless number portability and do not readily move contract without retaining their number, they have contract tie-ins which are difficult or prohibitively expensive for Cell C or the customer to break, and generally are higher usage and ARPU customers. Prepaid customers on the other hand can more easily switch networks (although number portability issues remain) because they are not contractually tied to the original network.

3.5.7 Cell C believes these subscriber, traffic and revenue related imbalances indicate that competition is not balanced between all operators and all customer types but the subscriber and traffic figures can be manipulated and will change frequently, whilst revenue is a more constant indicator of the need for asymmetry.

3.5.8 In some European countries, late entrants have a greater share of traffic than share of subscribers because they offer better deals and larger bundles. However, it is not usually the high usage customers that churn. Not being able to compete for higher usage customers because they are prevented from switching by low on-net offers (as we have explained above), highlights a lack of competition in this important sector of the market (i.e. for high usage customers).

3.5.9 Cell C has highlighted in its August 2013 submission that the European Commission[10] considers 20% revenue market share to be the *minimum efficient scale* in 2G/3G networks in Europe, a region with significantly higher usage than in South Africa, and many more densely populated countries. Cell C considers that *minimum efficient scale* in South Africa will be at least 25% revenue market share for a 2G/3G operator. Cell C also expects that *minimum efficient scale* in 4G networks will be higher than 25% revenue market share because these new next generation networks are accompanied by much higher costs.

3.5.10 *Minimum efficient scale* is important because it reflects the achievement of efficiency in operating size and exploitation of *economies of scale* which are considered sustainable in the long-run. If an operator is below (efficient) scale on this measure it will either exit the market, or will need to find a mitigating solution (such as cost-savings, lower quality, less demanding shareholders and consumers, smaller or less network rollout) and these factors clearly reduce the ability of sub-scale operators to compete with super-scale operators. Cell C must also note at this point that in the current South African economy, reducing costs is a priority in any event, and further reductions in the level of asymmetry will have the same negative effects as set out above in this paragraph.

3.5.11 Licensees could qualify for asymmetric rates on the basis set out above (as explained in section 2.4.5(6) of the explanatory notes). ICASA's view was that "*the application of asymmetric rates for a transitory period will benefit total social welfare by stimulating increased competition in the respective markets, thereby benefiting end users. However, asymmetric (higher) termination rates may only be justified on certain criteria to ensure that only those licensees that are dedicated to the goal of reducing retail prices through competitive forces qualify for such asymmetry*."

[10] Paragraph 5.2.3 and following of the Commission Staff Working Document accompanying the Commission Recommendation on Regulatory Treatment of Fixed and Mobile Termination Rates in the EU [C (2009) 3359 (final) SEC (2009) 599].

3.5.12 Cell C again raises the importance of the deficiency in its spectrum, as being entirely relevant to the determination of whether or not it should continue to receive asymmetry. This is because Cell C's current spectrum allocation although more equal now than it was at launch, is less effective than its competitors' allocations due to the benefits of having contiguous spectrum.

3.5.12.1 The effects of this historical spectrum evolution cannot be removed from Cell C's cost base immediately, and the effects of poorer spectrum allocations have been recognised by many regulators in their cost-based calculations.

3.5.12.2 In the situation where operators have identical scale (e.g. 2 modelled operators with a hypothetical equal to 25% revenue market share), the impact of poorer spectrum may be relatively small (e.g. a 10% difference in the unit cost of traffic), but for the situation where the operator with the deficient spectrum also has a small market share, the implications of spectrum differences will give rise to a larger difference in the unit cost of traffic (i.e. it will be significantly more costly per unit of traffic).

Cell C submits that the correct qualification criterion for asymmetry should be determined with reference to revenue market share (at 25%) rather than minutes in the market, which do not represent the true competitive position in South Africa.

4 There should be an immediate drop in MTRs, without a glide path

4.1 The argument that there will be a "supply shock" has been raised before by the incumbents in support of a lengthy glide path. As *Figure 3* and *6* above illustrated, the supply shock is not as great as the incumbents would have ICASA believe.

4.2 In an article which appeared in TechCentral on 11 November 2013, Vodacom confirmed that its effective rate is already around R0.59 per minute for a prepaid call. However, its "stealth" plan and all the promotions offered by Vodacom (which in turn offer discounts off nominal rates) mask the effective rate for postpaid customers and these rates can therefore not be verified. In a webinar hosted by the Vodacom CEO, Shameel Joosub, on 13 November 2013, Vodacom confirmed that it has already offered some 500,000 customers significantly reduced prices on the basis of its "stealth" plan, ensuring as the CEO put it, that those customers will not move to other networks.

4.3 In this regard, Cell C also notes that one of the indicators of ineffective competition and market failure is lack of transparency in pricing. The "stealth" plan merely confirms this indicator is still

present, even after the introduction of the first set of pro-competitive remedies in the 2010 Call Termination Regulations by ICASA.

4.4 Using other markets as guidance, a big one-time step-down in MTRs would be logical (for example to align ourselves closer to Nigeria, the most comparable market). In fact this is exactly what took place – voluntarily – by both MTN and Vodacom in 2009 when they agreed to reduce the MTRs from R1.25 to R0.89, with no glide path, in anticipation of the introduction of the 2010 Call Termination Regulations.

4.5 Also persuasive in this regard is the fact that the glide path that was then introduced in the 2010 Call Termination Regulations failed to result in any form of price reductions or competition on prices until Cell C dropped its own retail prices by introducing the 99c "for real" tariff in July 2012. Price reductions have taken place, but at a very slow pace – MTN is still reluctant to drop its nominal prices by any significant amount.

4.6 Finally, in a Moneyweb interview on 18 November 2013 with Sipho Maseko, the Telkom CEO, he said "*In our view we want to achieve two things, firstly what needs to be achieved is that we're seeking parity between fixed termination rates and mobile termination rates and we seek that parity immediately, so there should be no glide path to parity, especially if you take into account the fact that these should have changed nine years ago. So R55bn, R60bn later into the big mobile operators we think that affording another three years or so of glide path will totally be unfair to Telkom because it means that Telkom would have had to subsidise them for the last 18 to 19 years, so we want to stop that. So they go somewhere but actually for us we want less of a glide path but more of a cliff*". In this Telkom clearly supports an immediate drop in the MTRs.

5 Likely challenges by the incumbents

5.1 As we indicated in our August 2013 submission, Cell C foresees that it will face opposition from the SMP incumbent operators on a number of grounds. We have set out some examples below, along with our response in each case, which should be read together with the balance of this submission:

5.1.1 <u>Cell C is acquiring more subscribers now (in 2013) and its revenues must therefore be increasing</u>:

5.1.1.1 As we set out above, scale is not related to the number of subscribers or minutes in the market, but is directly related to revenue. Cell C's main tool to improve tariffs for consumers is price competition. To reduce prices so as to attract consumers to Cell C, our revenue will obviously grow more slowly than minutes, and there will be a negative effect on Cell C's EBITDA.

5.1.1.2 It is likely that MTN and Vodacom will suggest that because Cell C's subscriber base has increased, its revenue must also have increased and this increase would be sufficient, making further relief unnecessary. However, revenue growth does not in and of itself mean that Cell C is profitable. Profitability is obviously critical for a sustainable business. Profitability flows from an excess of revenue over cost. We have addressed this point in more detail above in section 3.5 above.

5.1.2 Cell C's costs are too high:

5.1.2.1 Cell C's costs are high, but this is due to significant barriers to growth and achieving equality in scale (e.g. functioning of MNP, asymmetry in reliance on third party infrastructure due to date of entry, competing with discounted or differential on-net offers).

5.1.2.2 It is also true that insufficient mitigating factors are available, otherwise Cell C would be achieving a higher EBITDA margin.

5.1.2.3 Calculated over the long-run, even on the basis that Cell C will grow to a more equal market position, Cell C's costs will be higher than those of Vodacom and MTN. This is because Cell C has achieved less utilisation of the large fixed-cost network over its lifetime, and will also achieve less utilisation in the forward-looking period compared to the operators with 35% or more market share.

5.1.2.4 As an example of how Cell C is optimising its costs, it has recently consolidated its premises by taking a long term lease in Waterfall Estate, in which it will house all of its staff, call centre, and warehouse. This action, following the termination of existing leases, means that Cell C will be achieving cost savings as the different premises were in aggregate actually more expensive, and the cost of time and travel required by staff members between buildings will be avoided when all our staff are in one place.

5.1.2.5 We also repeat the statement made by the Vodacom CEO in the webinar referred to above in section 3.1.13, namely that to compete, Cell C would have to invest at least as much as Vodacom in its network.

5.1.3 Cell C is not an efficient operator and if granted more asymmetry it will continue to operate inefficiently:

5.1.3.1 It is important to distinguish between efficiently incurred costs, and efficient scale. Cell C believes its costs are efficiently incurred – it does not seek to incur expenditures which are unnecessary, and it undertakes cost and investment control activities to optimise its expenditures. However, efficient scale is achieved when deployed capacity is well utilised,

and 10-15% revenue market share does not represent efficient scale. As Cell C has already submitted, and as has been argued in other regions, minimum efficient scale is 20-25% revenue market share in the case of voice networks in South Africa, and likely to be more than 25% in the case of 3G and 4G data networks in the country.

5.1.3.2 Relief from another source such as asymmetry is therefore necessary to bring down the cost to our shareholders of achieving sustainability through having the requisite scale, as measured by revenue market share.

5.1.3.3 Achieving scale will also generate the necessary profitability to lower Cell C's cost of capital. That will open up more capital for more investment and hence more competition

5.1.3.4 Our competitors have been able to generate this profit/create a large retained earnings base because they were originally the incumbents (making super-normal profits) and have used the advantages of incumbency to sustain their franchise and perpetuate their earnings.

5.1.3.5 Profitability feeds into cost of capital. If you are less profitable, you take longer to service your capital. Intuitively, this implies more risk and hence a higher cost of capital. This is also true of Cell C.

5.1.3.6 A decision to remain "small" would harm Cell C. Cell C is currently not sustainable as a business so it would not make any sense for it to remain unsustainable.

5.1.4 <u>Cell C should have launched 3G services earlier or should not have launched 3G services at all</u>:

5.1.4.1 The first line of argument is difficult to sustain in our view. Without offering 3G services, Cell C would not have been able to sustain its voice business and compete with Vodacom and MTN's data offerings, but Cell C could not have launched 3G services earlier because of the cost of the infrastructure investment, the allocation to it of sub-optimal spectrum for voice, and its position as a challenger network which had a chilling effect on its ability to attract finance.

5.1.4.2 In relation to the second argument, voice services are regarded as a less likely future revenue stream than data services in any event, on a worldwide scale. It is arguable that data services currently drive voice service usage, in that a growing number of subscribers seek packages offering high value data, which also offer a voice component.

5.1.4.3 Forward-looking analysis suggests that Cell C needs to be able compete to achieve the same scale as the other 2G-3G operators: the market is advanced and needs both 2G and 3G services, especially for postpaid customers who have broader service demands, but also to efficiently deliver prepaid data services. As old 2G-only handsets are steadily replaced with

more modern (but still low-cost) 2G-3G handsets, then combined 2G-3G networks will be needed to deliver improved economies of scale and further lower tariffs. If Cell C were to remain a 2G-dominated business it would soon become a second-class network which would be uncompetitive in the long-term.

5.1.5 Cell C ought not to have rolled out a national network and should have roamed more extensively:

5.1.5.1 Again, Cell C would have been unable to compete at all without its own network.

5.1.5.2 The extent of Cell C's rollout is conditioned by the build-or-buy decision when comparing own coverage investment costs (build) versus national roaming (buy) prices. In order to compete effectively with the large incumbent mobile operators, Cell C needs to offer nationwide service availability, as to do anything less would result in a significant drawback to its ability to market and acquire customers (or existing as a 'second class' network).

5.1.5.3 Therefore, in order for Cell C to truly compete it was necessary for it to have its own network. When Cell C launched, the concept of an MVNO did not exist in South Africa, indeed wholesale services were not really an option. MVNOs as a concept were relatively new around the world.

5.1.5.4 The national roaming agreement concluded with Vodacom in 2001 was the first of its kind in South Africa – and was entirely commercial and not based on regulatory principles at all. The first MVNO was only launched in South Africa by Cell C, in the form of Virgin Mobile, in 2006.

5.1.5.5 It also bears noting that the national roaming deal that Cell C concluded with Vodacom in order to even be able to launch service, was concluded on Vodacom's terms given Cell C had no negotiating position of any kind, nor regulatory support.

5.1.5.6 In consequence, the terms were not favourable and Cell C labours under them even today, despite building out its own network. The cost to Cell C of the national roaming services provided by Vodacom constitute a significant portion of Cell C's total call cost (excluding MTRs). This cost should be included – at the amount incurred – in the effective cost per minute for Cell C. This represents an unavoidable asymmetry in costs as Cell C is not able to secure national roaming at a price comparable to its own costs – it must pay a high rate for national roaming minutes as Cell C does not have countervailing buyer power to negotiate a better deal.

5.1.5.7 In addition, the poor customer experience of the Cell C customer while roaming on the Vodacom network results from Vodacom's failure to provide a quality roaming service. Today

Cell C still has no seamless in-call handover when a call is roaming on the Vodacom network and returns to the Cell C network. There are obvious perception and reputational issues for Cell C as a result.

5.1.6 Cell C pays too much to distributors and other third parties:

5.1.6.1 MTN and Vodacom had been in the market for 5 years when Cell C launched its services. These operators have largely led the way in setting commission which Cell C has had to match in order to attract distributors and open other channels to market.

5.1.6.2 As is the case with Multichoice which has sewn up content providers around the world making it impossible for any broadcaster to compete with it on content, so MTN and Vodacom ensured that they had secured arrangements with all the key distribution and channel partners that existed at Cell C's launch, and thereafter.

5.1.6.3 In order to secure exclusive distribution channels and in order to ensure that non-exclusive channels also promote Cell C offerings in the retail market, it has been the case that Cell C, as a price-taker, has had to offer higher commission, or offer volume and other incentives. This is normal commercial behaviour, particularly for a challenger business which will typically be a price-taker in these circumstances.

5.1.6.4 In an article published on 10 June 2013 in ITNews Africa, the Virgin Mobile CEO, Jonathan Marchbank, said "*Because Vodacom and MTN have an existing base, its clear they basically control the retailer. If you as a smaller player go to retailers to offer choice to consumers, the retailers say it will take away from trailing revenue stream that they have from Vodacom and MTN because they'll be dividing sales into four different carriers rather than two different carriers.*"

5.1.7 Asymmetry was given to Cell C when it had already been in the market for more than 9 years, it is not appropriate to extend this benefit at the expense of other operators, and amending the pro-competitive remedies on the basis that Cell C has requested will have negative and prejudicial effects on the SMP operators and ultimately, for consumers:

5.1.7.1 We believe it likely that as both MTN and Vodacom are listed companies, they will argue that the proposed MTR reductions coupled with asymmetry in favour of Cell C, will have a detrimental effect on investor confidence, with knock on prejudice to their business, jobs, and job creation. Cell C believes they may well also seek to argue that government in whatever form (including ICASA) should not take regulatory action that may result in a decline in investor confidence and/or a reduction in profitability. It is, however, important to remember the purpose of the introduction of price regulation, which is to reduce the prices charged to

consumers and the resulting high cost to communicate, which itself affects investment and particularly foreign direct investment into the country.

5.1.7.2 It is also arguable that the valuations of MTN and Vodacom have depended on income from an absence of regulation (prior to 2009) and then on income flowing from regulation (post 2010) which effectively reduced interconnection costs to MTN and Vodacom. In addition, as we have previously noted, both MTN and Vodacom benefited from asymmetry as against Telkom in the early days of their operations, of R1.00 in absolute terms (around 400%). This asymmetry naturally contributed to their ability to establish themselves in the market, which benefit they continue to reap today.

5.1.7.3 For so long MTN and Vodacom have been making super-normal profits that this is actually accepted as the norm and expected, and competition and the outcomes of competition have been ignored (or celebrated) to the detriment of the market and the consumer.

5.1.7.4 ICASA's regulation needs to adjust the concept of what is "normal" and endorse the concept of profitability without monopoly profits – rewarding entrepreneurship rather than market power. Cell C considers that it is past time that analysts took note of the effect for consumers in general, of the re-allocation of the producer surplus.

5.1.7.5 The objectives that ICASA must bear in mind under the ECA include the promotion of competition, not the propping up of incumbents or sustainability of super-normal profit levels.

5.1.7.6 In fact, the arguments that MTN and Vodacom would have us believe, namely that their share price will be negatively affected by the imposition of further cuts in the MTR and even continued asymmetry for Cell C and other challenger networks, seem to be a red herring when seen in the context of their share price movement since the date of the publication of the Draft Regulations, as can be seen from *Figure 10*. It should be noted that MTN's share price is significantly less sensitive to events in the South African market, and in fact Vodacom's share price almost reached its all-time high on Friday 15 November 2013.

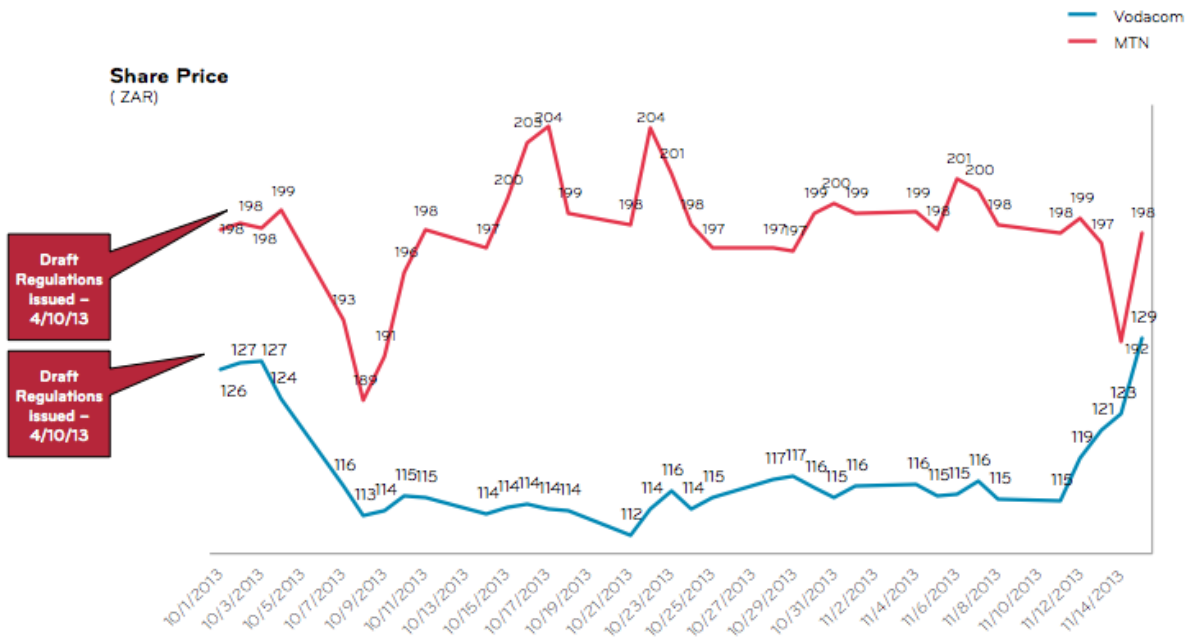

Figure 10: Vodacom and MTN daily closing share prices (in ZAR)

5.1.7.7 This is a regulated industry, and worldwide, it has become accepted practise that regulation will include economic (or price) regulation where markets are not competitive. Since the early days of market liberalisation operators have been required to report on or seek approval for tariffs to be charged to consumers. In South Africa, tariff filings are required from mobile operators and Telkom is subject to a cap based on a 'basket of services' formula.

5.1.7.8 Over time ICASA has tried to regulate price, as shown in *Annexure B*. However, MTN and Vodacom have, throughout the period from their launch till 2009, operated without regulatory or market constraint as to price in the retail market, and without any form of regulation of their termination prices, in the wholesale market. The result is clear to all – South Africa labours under some of the highest prices in the world for telecommunications services.

5.1.7.9 It would be disingenuous to say the least and even outrageous, to argue that further regulation by ICASA would have the direct result of job losses, loss of investor confidence, or a serious and significant drop in profit. The likely amount of "loss" could and should be addressed by increases in innovative pricing strategies. The result would also be to achieve ICASA's specific objectives in this exercise. Dr Christoph Stork of ResearchICT Africa observed to TechCentral on 11 October, that "*In line with their pioneering role and market leadership, they [MTN and Vodacom] have found new productive revenue streams through growing their data business and their value-added services*."

5.1.7.10 According to the companies' most recent reports, revenue market share of each of MTN and Vodacom has actually increased in the period in which the 2010 Call Termination Regulations applied.

5.1.7.11 Vodacom hosted a webinar on 13 November 2013 to discuss its September 2013 interim results in which its CEO confirmed that Vodacom is not over-staffed, and in fact needs to gear up, and that he does not see headcount reducing.

5.1.8 It goes without saying that Cell C must compete with MTN and Vodacom which means that it must offer the same or similar packages and value. The only area on which Cell C can truly compete because of its size and lack of countervailing buying power, is price. Even that has been made more difficult with no asymmetry for 10 years, and then only limited asymmetry for 3 years since March 2011.

5.1.9 ICASA should be aware that the first effect of changing termination rates is to modify the balance of revenue flows between players – this has knock-on implications on the overall EBITDA earned by different players, but it does not immediately take profits out of the market (it just moves them around). High rates amplify the flows (meaning a larger proportion of the retail revenue base is passed between players); low rates limit the flows. Symmetric rates mean that traffic (im)balances control the flow of revenues, conversely asymmetric rates can rebalance the flow of revenues in a particular direction (e.g. fixed to mobile, large to small). It has been described as a zero-sum game in that wholesale payments simply pass a balance of revenues and costs between players, but do not influence the overall revenues extracted from the retail market.

5.1.10 In the longer term, the promotion of asymmetric interconnection rates is a specific policy tool which ICASA should adopt to improve the competitive situation.

5.2 It would be in line with international best practise for MTRs to converge with fixed termination rates eventually. The proposed glide path correctly anticipates that MTRs will drop to around R0.10, but suggests that fixed termination rates would be higher than MTRs. Cell C does not agree with this position. As we have set out earlier in this section, even the Telkom CEO supports fixed/mobile symmetry.

5.3 In the next section, Cell C discusses other claims by MTN and Vodacom regarding the likely effect of proposed cuts in termination rates on their business which claims have later been negated.

6 Addressing the credibility of MTN and Vodacom's arguments against a reduction in MTRs and sustained asymmetry

The observations set out in this section should be seen in context. Cell C has illustrated this context by way of *Figure 11* which describes the dividends declared by each of Vodacom and MTN, compared to Cell C's EBITDA.

Figure 11: Cell C's revenues are smaller than each of MTN's and Vodacom's dividends
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6.1 MTN

6.1.1 We note that in June 2010, MTN presented a series of slides to ICASA in response to the then draft Call Termination Regulations in which it stated "*the cut [is] extremely aggressive", there would be "an associated business shock = cuts in jobs, network investment and penetration subsidies = policy objectives*". Later in the presentation they stated that the impact of the 89c March cut (which was then voluntary), was "*MTN jobs, 30% reduction in 2010 capex (rural/broadband investment), R Ms cut in channel investment (impact on independent SP profits and jobs), R Ms cut in access subsidies (impact on penetration of LSM1-3*".

6.1.2 In fact MTN and Vodacom announced on the second week of November 2013 that they planned to reduce the commission payable to service providers – in advance of the implementation of any final call termination regulations.

6.1.3 MTN's group capex figures as set out in their own financial reports, indicate that despite an initial drop in group capex in 2010, the trend in capex has been upwards. The reduction in group capex therefore had nothing to do with the introduction of the 2010 Call Termination Regulations. The South African capex figures are reflected in the table below:

Financial Year	**MTN Capex (ZARbn)**
2009	6,034
2010	3,908
2011	4,105
2012	6,416

6.1.4 Furthermore, as Cell C has indicated, its complaint to the Commission against each of MTN and Vodacom is based on section 8 of the Competition Act. This section prohibits the abuse of a dominant position. Cell C alleges that each of these operators charges so differently for their on-net and off-net calls that the current off-net rate must be regarded as excessive if the on-net rate can be sustained at such a low level, and that by reducing the price of its on-net

calls to below the current regulated mobile termination rate, each of MTN and Vodacom is engaging in margin squeeze – Cell C cannot match the prices charged because it would make no margin in doing so. Excessive pricing and margin squeeze are indicative of an abuse of dominance.

6.1.5 Cell C made these points to ICASA in its second submission in July 2013, in response to a request for information from ICASA. MTN is in fact offering prices that are so heavily discounted (in MTN's own words, between 67% and 100% discounts operate on the MTN Zone packages), that LSMs1-3 (and the other LSM groups) must be benefiting.

6.1.6 Furthermore and as we have indicated above, the MTN CEO (at the time Phuthuma Nhleko) also agrees that scale is important, commenting in the March 2010 Group Chair and CEO report that "*MTN's strategy is to leverage the brand and already widespread presence to achieve sustained growth and more operational efficiencies. In his report on page 26, the chief operating officer details Group initiatives to standardise equipment and processes, and simplify and centralise functions. Among these are successful efforts to leverage the Group's scale to secure more competitive pricing from vendors, the number of which MTN continues to rationalise without sacrificing competition."*

6.1.7 More recently MTN's current CEO, Zunaid Bulbulia, was reported in ITNews Africa on 10 October 2013 that *"Market performance in the EU is being hampered by the inability of operators to exploit economies of scale and scope, thereby slowing network deployment, impeding innovation, and harming consumer welfare*," As we mentioned in section 3 above, on 25 April 2013, in Business Day Live, the MTN Group's chief mergers and acquisitions officer, Khumo Shuenyane, stated that "*It is difficult to compete in this industry if you don't have scale, not least because it is harder to negotiate price with equipment suppliers*."

6.1.8 MTN went on to describe the global trend in regulation as "*to remove, not introduce mobile asymmetry/competitive subsidies" and that "it would be a first to introduce asymmetry from a position of rate symmetry*".

6.1.9 As Cell C has shown in its international benchmarking, there are cases where operators with symmetrical MTRs were then granted asymmetry. The MTN argument is not relevant where the underlying facts and regulatory structure is so very different from the situation in those countries which MTN might have examined.

6.1.10 In a public forum at the broadband conference in October 2013, MTN's CEO, Zunaid Bulbulia, made the statement that "*South Africa has to choose between having many telecommunications operators or encouraging investment from existing players to drive prices down and increase adoption*," or in other words, MTN seems to favour a duopoly and would be in favour of driving Cell C out of the market. Given this attitude of self-interest and self-

aggrandizement, any attempt by MTN to frustrate the further reduction of prices and increased asymmetry for challenger players and new entrants will be opposed strongly.

6.1.11 Cell C has the transcript and recording of an interview with MTN's Group CEO Sifiso Dabengwa ("SD") on the 702 Business Show with Bruce Whitfield ("BW") on 14 August 2013. Certain parts of that interview are reproduced below, to indicate the real reason why MTN may have lost subscribers in the period to 2013, which has nothing to do with Cell C's asymmetry or the reduction in MTRs:

"BW: Customer acquisition continues apace across the international network. I mentioned you have got more than 200 million customers. In South Africa, however, you are haemorrhaging, you lost more than 400 000 customers, which by my recollection is an unusually high number of customer losses.

SD: Yah, unfortunately, during the first half of this year our offerings were not very competitive. But in the latter part of the first half of this year, we adjusted our offerings and they are now very competitive and we are back to where we would normally be in terms of being able to get our fair share of new subscribers.

BW: So thank goodness then to Cell C for the rest of us, isn't it, because they are the guys that have been driving this sort of price competition.

SD: Well, yes, they have. They have.

BW: Are you getting responsive rather than proactive in the price war?

SD: Yah, I guess in the South African context that is what has happened. We have been responsive and as we have indicated we were probably slow in responding to the pricing challenges and that has led to the difficulty in subscriber acquisition that we have experienced.

BW: When you look at the established network, the solid customer base that you have got – more than 25 million customers in South Africa – the price activity of Cell C, the competitive aspect of it, you lose 400 000 customers. Is it really such a big deal in the light of MTN, when you have got the pricing power that you have got with a well-established and well-run network?

SD: Well, I wouldn't say that it's not an issue. We always want to make sure that we get our fair-share of subscribers in all our operations. Its not going to shift our value share that significantly, but we really make sure that, from a subscriber point-of-view, we always get our fair share in all our markets. "

6.2 Vodacom

6.2.1 In an interview with Alec Hogg in September 2009, Vodacom stated that "*it was not opposed to looking at these [interconnection] costs*". Mr Pieter Uys, then CEO, stated further that "*we've never in 15 years, increased the prepaid tariff. In real terms, prepaid tariffs have only come down*." Mr Uys also stated that "*depending on how much it is [interconnect revenue*

comes down] we will have to also look at our investment if it comes down a lot. We can't continue to build coverage in just all of South Africa. We can't continue to invest at the rate we are."

6.2.2 Vodacom's capex in South Africa has increased significantly since MTR's have been regulated. It also expects to spend between 11% and 13% of total revenue on further capex, which with current total revenues of approximately R60bn suggests that capex will remain at the current levels or even increase.

Financial Year ending 31 March...	**Vodacom Capex (ZARbn)**
2010	4,753
2011	5,100
2012	6,976
2013	6,967

6.2.3 In an article that appeared in BusinessTech on 11 November 2013, Vodacom's CEO is quoted as saying that Vodacom would benefit from Project Spring which is designed to improve various capital-intensive projects including fibre to the home and fibre to the business. Vodacom confirmed its plans include increasing spend on capex to between 14% and 17% of revenue. In the same article, Vodacom again "warned" that ICASA's plans to reduce termination rates "*may have an affect on its capital investment plans*". The CEO also said that the current proposals would have "*knock on effects in the business*" which may "*force a rejig*".

6.2.4 Cell C notes how this statement is almost identical to that made by the previous CEO in 2009 – and yet investment did not decrease and Vodacom proudly announced its increase in capital expenditure.

6.2.5 In June 2010 Vodacom stated that if the new rates were introduced they would "devastate" the industry. In the May 2013 article referred to above, Vodacom's CEO also noted that "overall" revenue had increased by 4.5% in the previous year, to R66.9billion. He also noted that *"It's thanks to this intense investment activity that we've got the footprint, capacity and technology to capitalise on the smart device revolution. Crucially, it has also enabled us to operate more efficiently and expand our margins despite comprehensive price reductions*."

6.2.6 Vodacom stated in response to the news of Cell C's competition complaint regarding the difference in prices charged for on-net and off-net calls, that "*Its hard to argue that increasing prices would be a benefit to consumers*".

6.2.7 The premium rates charged for off-net calls by comparison, are hardly beneficial to consumers.

6.2.8 In August 2013 Vodacom's CEO, Shameel Joosub, announced to mybroadband that it is planning to provide customers with better value for money on an individual level, which makes it difficult for their competitors to respond. The approach seems on the one hand to acknowledge that prices can be reduced and on the other hand, to not want the exact amount of the reduction to be matched by a competitor – hence the so-called "stealth" plan introduced by Vodacom.

6.2.9 Mandatory reductions in wholesale prices will require a flow-through to consumer prices, enabling more customers to benefit than just the select few. Assuming it is perfectly possible financially for Vodacom to tolerate and in fact, encourage reduced rates, the proposed MTR reductions ought to have little effect on Vodacom.

6.2.10 Deutsche Bank has issued a "buy" rating for Vodacom at 11 November 2013, despite risks of "*regulatory interference and unexpected competitive changes*".

6.2.10.1 In the same research document, Deutsche Bank notes Vodacom's commitment to increasing its investment in capex is dependent on the outcome of the MTR process, but observes "*We wonder how serious this threat is, since we doubt Vodacom would be willing to allow smaller competitors to erode its infrastructure advantage in its most critical market*".

6.2.10.2 Deutsche also note, importantly in our view as this enforces our argument that a pro-competitive remedy has a significant effect on Cell C and almost no effect on its competitors, that "*If the impact of interconnect is stripped out SA service revenue grew 2.6% which gives a better sense of the underlying momentum*."

6.2.10.3 The Vodacom CEO recently confirmed in a Vodacom webinar commenting on the Vodacom interim results on 13 November 2013, that Cell C should invest the same amount as Vodacom (ie R7 billion per annum) in order to compete – knowing full well that for an operator with less than 10% revenue market share, this is impossible.

7 What approach should the incumbents be considering instead of arguing against MTRs and asymmetry?

7.1 Cell C has set out below a list of alternatives for a business such as MTN and Vodacom, facing an inevitable regulatory outcome from a lack of competition and continued high prices, which should be considered rather than defaulting to the highly emotive threats to cut jobs and/or reduce investment in infrastructure and service quality – the sensitive underbelly for government in a pre-election phase, although these would be sensitive areas for government at any time:

7.1.1 Like Tsogo Sun, reduce spend on a small number of executive packages rather than cutting lower level jobs in higher numbers. The total number of jobs in this sector of the South African market should be considered – it may be the case that a number of positions at an incumbent are lost but this would also mean that job opportunities would be significantly increased within the challenger networks as they increase their market share and compete head on with the incumbents;

7.1.2 Reduce the lavish bonuses for top management which in many cases exceed base salary levels (and certainly exceed Cell C packages) (these appear from the financial statements of each of MTN and Vodacom);

7.1.3 Reduce dividend payments to foreign and local shareholders (so reducing capital outflows from the country);

7.1.4 Recognise that super-normal profits are not lifelong benefits, but rather the result of a monopolist exploitation of a weak regulatory regime;

7.1.5 Focus on increasing innovative packages to consumers to grow or maintain market share in the face of increasing competition – as is the case in every other market and in many other service industries. This would include pushing new revenue streams such as data;

7.1.6 Develop international growth markets (which are in any event a key focus area for both MTN and Vodacom);

7.1.7 In some parts of the market, costs may be incurred that do not contribute to consumer welfare (e.g. rapid replacement of still-working handsets). In other parts of the market, cost savings may be achieved e.g. from the stimulation of network sharing, optimisation of customer care activities). Short-time promotions, bespoke negotiations with customers and conditional free-minute offers also affect competitive dynamics. Cell C is of the view that there are numerous ways in which the market could easily adapt to an asymmetric MTR situation, and many of these ways would be to the advantage of competition and consumer prices in the long-term.

7.2 The “saving” that MTN and Vodacom will make in the reduction in MTRs payable between each other and as regards Telkom (which constitutes approximately 70% of the Vodacom termination costs) should also be taken into account. This is shown in *Figures 2* and *5* above.

7.3 MTN and Vodacom achieve healthy EBITDA margins and their shareholders will be happy with this situation – this does not necessarily mean those shareholders have stronger incentives to invest in telecoms services in South Africa, as they may use high profits within a group structure or for other out-of-country investment decisions.

7.4 Similarly, operators that have a large market share but face a reduction in traditional revenues could decide to invest in new technologies in order to differentiate their business, offer new services, and/or stimulate new revenues from existing customers in a more competitive market.

8 There are various approaches to setting mobile termination rates

8.1 Legal approach

8.1.1 This section should be read with the analysis of the Draft Regulations by Cell C set out in section 9 below.

8.1.2 There is a distinction between the initial analysis required of ICASA under section 67 and a review. The initial analysis arguably requires significant investigation in accordance with section 67(4), whereas a review requires (i) a review of market determinations made under the initial analysis, (ii) consideration of whether or not the licensees to whom pro-competitive conditions apply still possess SMP, and (iii) a determination as to whether the previous remedies are proportional or should be modified to achieve proportionality.

8.1.3 This last point is the important point here – are the remedies proportional to the identified and ongoing market failure. It is also important to consider how the review of market determinations under 8.1.2(i) should take place.

8.1.4 The Guidelines suggest that ICASA should take the matters set out in Tables 1 and 2 into account. ICASA sought information from all licensees in the same format in order to assist it in considering these factors. ICASA clearly considered the information in determining that the market definition has not changed, and nor has market share. ICASA would have been able to assess the dynamic characteristics of the market, as required by the Guidelines, and based on our submissions and those of our competitors, ICASA should have been able to assess countervailing buying power. In short, all the relevant information that ICASA might have needed for a review, was before it.

8.1.5 Except for the areas in which we suggest changes ought to be made to the Draft Regulation which are set out in *Annexure D*, arguably the only matter that remains is to consider whether the remedies proposed are proportionate.

8.1.6 Forward-looking market assessments are invariably inaccurate forecasts, the market has in fact experienced some unforeseen consequences, including:

- the increase in on-net traffic stimulated by Vodacom and MTN's preferential on-net pricing to their own communities; and

- the financial prejudice to Cell C by virtue of the relatively short period for which meaningful asymmetry applied, despite Cell C's attempts to compete with the SMP operators as required by ICASA.

8.1.7 Cell C considers the asymmetry afforded challenger operators in the 2010 Call Termination Regulations to have been too little too late. This means that in our view, the proposed remedies in the Draft Regulations are not proportionate or sufficiently pro-competitive. We say this for the following reasons:

8.1.7.1 In other countries that we have considered in this regard, the asymmetry afforded to new entrants (almost standardly), was in place until those operators achieved scale – commonly considered to be between 20% to 25% market share (depending on the number of operators in the market). This asymmetry was also far greater than the 10% (or R0.04) currently afforded to small or challenger networks in South Africa. This is also significantly lower than the historical rate afforded MTN and Vodacom when they launched, as against Telkom.

8.1.7.2 As previously noted by Cell C, MTN and Vodacom received an effective 400% (or ~R1.00) asymmetry vis a vis Telkom at launch, and the fact of asymmetry is still preserved today. There was no "cost model" employed in the setting of this rate, it was presumably set by agreement which was endorsed by the then regulatory authority, SATRA.

8.1.7.3 In the European Union in the mid 2000s, the Commission considered that termination rates should be based on the costs of an efficient operator and should therefore normally be symmetric. However, the Commission recognized that, in certain (exceptional) cases, asymmetry might be justified by objective cost differences which are outside the control of the operators, such as (i) different network topologies due to the use of specific frequency bands and costs associated with sub-optimal spectrum allocation; and (ii) substantial differences in the date of market entry which could justify higher termination rates in a reasonable transitional period[11]. Cell C considers the current stage of development in the market in

[11] Paragraph 3.1.3 of the Commission Staff Working Document accompanying the Commission Recommendation on Regulatory Treatment of Fixed and Mobile Termination Rates in the EU [C (2009) 3359 (final) SEC (2009) 599], read with the Commission Recommendation of 7 May 2009 on Regulatory Treatment of Fixed and Mobile Termination Rates in the EU. 2009/396/EC. Preambles 7(3), 9(5), 20, 16 and 17, and paragraphs 9 and 10.

South Africa to be similar to European markets at that time. We attach as *Annexure B* a copy of our research in this regard.

8.1.7.4 ICASA has not, as a regulatory authority, afforded new entrants in any market (electronic communications or broadcasting) sufficient or in most cases, any assistance to enable them to become established or to compete on a relatively level playing field with established market players. As Esselaar and Weeks observed, "*The unfortunate licensing mess that ensured between 1998 and late 2001 when Cell C was finally licensed just contributed towards the lack of any competitive constraint on the incumbent mobile operators….It is therefore also imperative that the regulator takes active steps to promote greater competition by licensing new operators, addressing anti-competitive behaviour, and promoting technological progress*". [12]

8.1.7.5 Other reasons include:

8.1.7.5.1 There has been very little change in the market shares of the dominant operators and other operators in the mobile market which suggests that there is still ineffective competition in this market.

8.1.7.5.2 The percentage reduction in MTRs that may be charged by MTN and Vodacom were observably too low.

8.1.7.5.3 There is still no transparent "cost" information available to ICASA on a regular basis.

8.1.8 It therefore remains to be determined what remedies would be legally appropriate and proportionate in the circumstances, to avoid further regulatory failure and subsequent market failure.

8.1.9 In Cell C's view, there is obligation on ICASA in terms of the Electronic Communications Act or the Guidelines or at all, to base the remedies on a cost model. In the next subsection we examine alternative economic approaches to determining remedies.

8.2 Economic approach

8.2.1 It is entirely possible and defensible to use proxies for cost and price control levels. These can be derived from considering the approach taken in other countries, and benchmarking. Cell C and other licensees will present information to ICASA on the basis of "best practice" in other countries. We know that in Namibia, the regulatory authorities determined a termination rate with reference to rates set in other countries.

[12] Esselaar, S and Weeks, K. "The case for the regulation of call termination in South Africa: an economic evaluation."

8.2.2 Benchmarking is a common practice and a useful one provided the benchmarks selected are both relevant and appropriate, and by this we mean they should be selected based on comparable data such as population density, GDP per capita, socio-economic issues, market development, penetration, ARPU levels, and maturity of licensee. The exercise of benchmarking should also be undertaken using uniform methodologies, specifically when examining issues like peak and off-peak rates, SMP criteria, and traffic profiles (on-net or off-net, peak or off-peak).

8.2.3 In Europe the trend towards a low or zero rated termination rate is the result of years of application of Directives and Recommendations. This is not the case in South Africa. The benchmarks we have included with this submission as *Annexure B* are recent and relevant benchmarks that take other relevant factors into account when considering an appropriate rate of MTRs and asymmetry, based on the level of development of the benchmark markets as compared to South Africa's current level of development (absent any ongoing regulatory intervention). In South Africa, for example, rural coverage and under-served areas are still important social and policy issues. European MTRs or proxies for cost (arrived at using LRIC models) may therefore not be appropriate for South Africa. Cell C believes that other mobile operators including the incumbents, agree with this position. Scale-dependant efficient costs in South Africa and the need to redress the imbalances of the market in the past and the likelihood that a forward-looking assessment will reveal similar imbalances, should be uppermost in ICASA's mind.

8.2.4 Looking at this another way, it is entirely plausible that the proposed rates are a reasonable reflection of true cost, in the absence of data to the contrary. Under certain demand and other projections, as set out below, the proposed rates not only reflect best practice – the rate to which other countries are moving, but the <u>most likely rate of an efficient operator</u>.

8.2.5 In considering this section, it is also relevant to consider Cell C's arguments as set out above in section 3 regarding the historical and current level of super-normal profits received by the incumbents, even after the introduction of the 2010 Call Termination Regulations. For example, Vodacom recently pronounced that it intends to spend between 14% and 17% of its revenue on capital infrastructure. Cell C's entire turnover in aggregate is lower than the lower of the two percentages.

8.2.6 Symmetric termination rates can lead to net revenue flows from smaller to larger operators, as with symmetric rates, larger operators with lower unit costs earn excess (or super-normal) profits on terminating calls, while small operators with higher unit costs cannot recover their costs and this disadvantages them in their ability to (i) compete strongly in the retail market, and (ii) attract inward and sustained investment at reasonable interest rates and on reasonable terms.

9 Specific comments on the Draft Regulations

9.1 The process by which the Draft Regulations are published in final form is as important as the substance because PAJA requires that all administrative action be procedurally fair. In Cell C's view, the process to date has been adequate and transparent, and has afforded all licensees a sufficient opportunity to state their position, to obtain clarity from ICASA as to the information sought, and to put forward their respective positions in several different ways. It is therefore imperative that the process proceed to the publication and implementation of the final Regulations without delay. Specifically it is vital that the Regulations be put in place in advance of 1 March 2014, so as to take effect as the 2010 Call Termination Regulations come to an end. If the Regulations are not going to take effect, there will be a legal and regulatory vacuum which will result in confusion, uncertainty, and prejudice to consumers as well as to Cell C.

9.1.1 The review commenced with an announcement in June 2013, that the review would form part of the "Cost to Communicate" programme launched by ICASA at the same time. Therefore from June 2013 all licensees have been aware of the process to review the remedies under the 2010 Call Termination Regulations, and the possibility that the outcome would be further regulation.

9.1.2 The Draft Regulation was preceded by an information-sharing process, in which all licensees participated. It was open to licensees to provide notes on their submissions. The deadline for providing information was extended by ICASA, to allow additional time to provide the required data.

9.1.3 ICASA then held one on one meetings with licensees to discuss their information.

9.1.4 Licensees then had a further opportunity to comment once the Draft Regulations were published, and these were preceded by a public announcement and explanatory session hosted by ICASA, at the beginning of October 2013.

9.1.5 Licensees were granted a further extension of time until 22 November 2013 to submit their written comments on the Draft Regulation.

9.1.6 During the comment period, licensees were again invited to attend one on one meetings with ICASA. Cell C attended with a full panel of representatives and was granted a substantial period of time within which to make their presentation. We assume that the same is true for all other licensees including MTN and Vodacom.

9.1.7 Licensees may now submit their written comments in any form, which is yet a further opportunity to make their position known.

9.1.8 All licensees have already taken advantage of the open press to also air their views.

9.1.9 In consequence, Cell C suggests that further hearings or opportunities to present are entirely unnecessary. ICASA is not obliged to hold hearings or to consult on any minimum number of occasions under the ECA. ICASA has substantially complied with its duties in relation to consultation, under PAJA.

9.2 There are a number of other legal issues that Cell C wishes to raise in relation to the Draft Regulations:

1. Did ICASA follow the correct process?
2. Are the conditions pro-competitive, rational, and proportional (reasonable)?
3. What is the relationship to cost?
4. Do the Regulations provide for sufficient certainty?

9.2.1 Process

9.2.1.1 Section 67(8) requires three steps:

i. A review of "market determinations" (this may be a review of "market definition" or a review of the effectiveness of competition in the market);

ii. A determination of if the licensees to whom pro-competitive conditions have been applied, still hold SMP; and

iii. A determination as to whether pro-competitive conditions are still proportional in light of any changes to the competitive nature of the defined markets.

9.2.2 Review of effectiveness of competition

i. In relation to the review of the effectiveness of competition, ICASA claimed it conducted a "forward looking assessment of the level of competition and market power in the defined markets" (regulation 4(c)), but the Draft Regulation does not actually go through these steps, or identify the indicators of competition as set out in section 67(6)(b)(ii). ICASA should show that it considered these indicators, or at least the indicators it evaluated in 2010, in order to confirm that competition in this market is still inadequate.

ii. "Inefficient pricing" is an outcome of ineffective competition, not a cause. The other outcomes identified in the 2010 Call Termination Regulations (access, discrimination, transparency) are also still present. ICASA should confirm that there was a review of the previous considerations, and the review revealed that there is still ineffective competition, and there are still poor outcomes as a result of this continued, ineffective competition.

9.2.3 On the proportionality of pro-competitive conditions

In order to link the ineffective competition and the new pro-competitive conditions the Regulations must:

i. reassert competition in the relevant market is still ineffective (notwithstanding the 2010 Call Termination Regulations);

ii. make reference to the objectives it intended to achieve through the 2010 Call Termination Regulations;

iii. state that if the pro-competitive conditions imposed in the 2010 Call Termination Regulations were adequate, the Authority would have expected to see evidence of more effective competition, which the above assessment confirms has not happened;

iv. state that therefore the same type of pro-competitive conditions should be retained, however the extent of those remedies, and the period for which they persist, must be extended until such time as the licensees to whom asymmetry is afforded have achieved scale (as defined), which is a failing of the pro-competitive remedies imposed under the 2010 Call Termination Regulations and ICASA could also comment here that this decision is necessary to avoid the unintended outcomes of the previous remedies.

It will be important to link proportionality of the new remedies to be imposed on licensees with SMP, to the basis on which they have been determined. The Regulations must, in Cell C's view, therefore:

i. confirm that a proportional remedy would be one that is related but only in part to cost, but should not be below a licensee's actual cost;

ii. state that it has established through industry data, interviews and its review, that the current cost of termination is R0.10. Therefore the proposed MTRs will reduce to R0.10.

In relation to asymmetry this does not need to be mainly or only cost-based as we have set out above. The Regulations should:

i. state that the objective of asymmetry is to assist small licensees to gain the scale necessary to effectively compete with larger licensees (at least 25% revenue market share) and so to promote effective and sustainable competition in the market, in line with the objective contained in section 2 of the ECA;

ii. reassert that the markets continue to reflect ineffective competition and that the revenue market shares illustrate that small licensees have been unable to use the asymmetry that was effective from 1 March 2011 to improve their ability to compete; and

iii. conclude that it is accordingly necessary to provide for more extensive and sustained asymmetry (i.e. for a longer period of time) to achieve this objective.

9.2.4 Cost and cost model

The ECA requires that the remedies be "pro-competitive" and "proportional". "Proportional" can mean "reasonable". Therefore the remedies must be tailored to meet their objectives (ie rational) and not be too extensive or too narrow to meet those objectives (ie proportional or reasonable). The role of cost is therefore, to a limited degree, to ensure proportionality. The role of pro-competitive remedies more generally is to adjust the balance of market power, to change the market structure in the absence of adequate market forces, to increase competition, and to mitigate the effect of market failure.

i. Reasonable proximity to cost is one way to achieve the requirement of proportionality.

ii. The asymmetry should have reference to the cost differences between small and big licensees in order to show that the level and period of asymmetry is reasonable.

iii. ICASA has indicated it had reference to cost in determining the level of MTRs (and possibly in determining the level of asymmetry). If a cost model is not made available, then as a minimum the decision should record all the elements set out above, and note that cost is but one and not the only factor to be taken into account; and that in taking it into account, ICASA's role is to ensure that the remedy is proportionate, rational and reasonable – ICASA does not have to propose a remedy that is purely cost-based.

The previous sections of this submission deal with factors other than cost that should be considered when determining asymmetry as a pro-competitive remedy, along with *Annexures B* and *C*.

9.2.4 Certainty

Licensees must be able to conduct their operations with some level of certainty about what regulation will require. The time-scales for the application of these Regulations results in uncertainty in relation to:

i. whether the Regulator will be able to change the level of MTRs at any time, based on new information it receives about cost (regulation 7(5)(b)(iv);

ii. whether the Regulator will change all the pro-competitive conditions at any time, on the basis of some vague determination that such changes are "necessary" (regulation 8); and

iii. the schedule for review and amendment of the Regulations must be clear and have specified time frames. The change in MTR should only be considered after the relevant scale has been achieved at which point a further review should take place.

Certainty is necessary so that ICASA does not intervene unexpectedly, so that business planning can take place, so as to enable licensees to give all relevant information to investors and shareholders, but also from failing to act. The final Regulation must also indicate the date when or period after which the market determinations and the remedies will be reviewed.

10 Other pro-competitive activities recommended by Cell C

10.1 ICASA is the regulatory authority for the electronic communications sector. It is tasked with regulating in order to promote competition. It is also required, as a matter of good practice, to review its own regulations to ensure that they are appropriate, proportionate and reasonable, from time to time. A responsible regulatory authority would need to ask if the regulations published by it are achieving their stated purpose, on a reasonably regular basis. In addition, such a regulatory authority would need to monitor the sector on an ongoing basis, to ensure that areas that are not currently regulated are not in need of regulation.

10.2 ICASA has, in Cell C's view, taken such steps at our urging, in relation to mobile termination rates and asymmetry, and has reviewed the 2010 Call Termination Regulations. However, it is Cell C's view that other areas also require attention in order to ensure that ICASA is fulfilling its mandate and is also creating an environment within which competition can flourish – provided that the regulation of wholesale prices by way of setting of an MTR with asymmetry, is already in place.

10.3 On 20 June 2013, Cell C addressed a detailed letter to ICASA regarding the Number Portability Regulations of 2005, to which Cell C has had no substantial response. We have attached a copy of that letter to this submission. In the paragraphs that follow, we will supplement the reasons that we set out in that submission, and again request that ICASA review these regulations as a matter of urgency.

10.4 We will also address the issue of essential facilities below, as the draft Essential Facilities Regulation was published in 2007 but never revisited. Cell C believes that this is an area that

requires regulatory scrutiny before the implementation of the broadband policy that is promised by the Department of Communications, can take place.

10.5 Furthermore, Cell C believes that the Reference Interconnection Offers of each of Telkom, Vodacom and MTN that have been filed with ICASA, do not consist in nor are they adequate as reference interconnection offers, as this term is commonly understood in other jurisdictions and international jurisprudence. We will also address this issue below.

10.6 Finally, Cell C has already noted to ICASA its concerns regarding national roaming. We addressed ICASA on this point on 18 July 2013.

10.7 Number Portability Regulations, 2005

10.7.1 As indicated above, Cell C's submission of 20 June 2013 contains several important points of substance which should be read as if incorporated into this submission. That submission contains argument on the appropriateness of in particular, regulation 7(3), which restricts the advertising of or marketing of porting if it consists in an incentive to port that is not also made available to other new customers.

10.7.2 We have considered the position under the Consumer Protection Act, 2008, and under the Advertising Standards Authority (ASA) code of conduct, being the two primary sources of legislation and practice in relation to what is acceptable conduct regarding consumers and marketing.

10.7.3 The ASA is a reactive body, it only investigates complaints lodged by competitors or consumers that contravenes the code which relates to misleading, unsubstantiated or disparaging advertising (which are the main provisions). There is nothing in the code that prohibits advertisers from making an offer to one group of people and not making the same offer available to another – the advertising must just be clear and not misleading.

10.7.4 Section 8 of the CPA contains provisions that create protection against discriminatory marketing. Offering different prices for any goods or services to any persons or category of persons is prohibited if the basis for the different treatment is on one of the unfair discrimination grounds in section 9 of the Constitution. This implies that if the basis of the differential treatment is not unfair or discriminatory, this would be allowed / permitted.

10.7.5 As we say in our previous submission, in no other industry including regulated industries, is there a provision that prevents advertising or marketing to new customers wherever they are coming from, whether they originate from another competitor, or not.

10.7.6 Again, Cell C urges ICASA to review the Number Portability Regulations as a priority. The restriction on offering incentives to port customers is hampering the ability of challenger

players to entice customers to their networks, although once they join, the likelihood of churn is low, and we are as a result, able to build our base more easily.

10.7.7 The rationale behind regulation 7(3) is not known, but it can only have been to protect the established customer bases of Vodacom and MTN who stood and still stand to lose the most by the introduction of number portability.

10.7.8 In addition to the proposed changes to MTRs and asymmetry as set out in the Draft Regulations, Cell C believes this will give it and other challenger networks a fighting chance of growing market share quickly and competing in a sustainable manner with MTN and Vodacom and really being able to offer innovative pricing and packages to consumers.

10.8 Draft Essential Facilities Regulations, 2007

10.8.1 In 2007 and after a thorough regulatory process, ICASA introduced the draft Essential Facilities Regulations. These sought to give effect to section 43(8) of the ECA, read with section 67.

10.8.2 Despite the publication of an explanatory note, ICASA did not take the draft regulations forward, and some 6 years later, no facilities have been declared to be “essential”.

10.8.3 The definition of “essential facilities” is contained in section 1 of the ECA and reads as follows, “an electronic communications facility or combination of electronic communication or other facilities that is exclusively or predominantly provided by a single or limited number of licensees and cannot feasibly (whether economically, environmentally, or technically) be substituted or duplicated in order to provide a service in terms of this Act”.

10.8.4 It is Cell C’s view that there are a number of “essential facilities” that ought to be declared as such, in order to ensure equal and non-discriminatory access on reasonable prices. Currently as ICASA is aware, access to facilities of Cell C’s competitors including Broadband Infraco, is challenging and often takes a long time. The rentals for sites are escalating at rates that are wildly out of line with market trends and given that many sites are shared, are significantly inflated in our view.

10.8.5 If relief can be offered for essential facilities, this will also assist smaller players in rolling out infrastructure more efficiently and this will no doubt have a beneficial effect on the cost of operations.

10.8.6 Cell C made similar submissions in our response to the Broadband Value Chain Review, earlier in the year, as part of the ICASA Cost to Communicate process.

10.8.7 Cell C highlighted the high cost of among others, access to high sites, municipal and provincial land (including road reserves), backhaul; and other difficulties experienced in negotiations with other operators.

10.8.8 Cell C recommends that ICASA re-issue the draft regulations for further consultation.

10.9 Reference Interconnection Offers

10.9.1 On 29 April 2013 Cell C requested that ICASA provide it with the RIOs of each of Telkom, MTN and Vodacom. In terms of the 2010 Call Termination Regulations, these operators were required to file RIOs with ICASA for approval and to publish these on their websites in 2011.

10.9.2 Despite requesting that each of these licensees renegotiate its interconnection agreements with Cell C on the basis of the RIO, each of them has refused, and instead, requested that Cell C should provide them with a RIO.

10.9.3 Cell C is not obliged to file a RIO and it is not obliged to accept the terms of interconnection imposed by each of MTN, Vodacom and Telkom. A request for interconnection by Cell C must be accepted by the incumbent SMP licensees unless it is not reasonable, meaning that it is "not technically and not financially feasible, and does not promote the efficient use of networks and services". This is a test that each of the other operators has failed to apply when Cell C's request has been made to it.

10.9.4 Because of the competitive pressure to roll out a network so as to be able to compete for customers nationally on both 2G and 3G, Cell C has often accepted the terms of interconnection without raising a dispute.

10.9.5 Cell C now requests that ICASA assist it by requiring Telkom, MTN and Vodacom to negotiate interconnection based on their RIOs only.

10.10 National Roaming

10.10.1 As set out in our submission of 29 July 2013 to ICASA in response to the Broadband Value Chain Review, Cell C depends on Vodacom for national roaming in certain areas of South Africa where it does not have its own network infrastructure.

10.10.2 In order to provide a seamless communications service to customers, thereby avoiding the perception of poor quality service, Cell C requires Vodacom to provide "seamless handover" of calls between its network and Cell C's network.

10.10.3 Despite various requests by Cell C, Vodacom has failed or refused to make seamless handover available as a matter of course.

10.10.4 Cell C alerted ICASA to this on18 July 2013.

10.10.5 National roaming is a critical form of access for new entrants. Until they can establish themselves and are able to expend the vast sums of capital that are needed to build out a national network of a high quality, coverage can only be achieved by using a third party network. In the absence of regulation in this regard, challenger operators and new entrants such as Telkom Mobile and Cell C have had to negotiate terms of access on a commercial basis. It is obvious that the relative bargaining power of the parties is not equal. It follows that the terms on which access is made available are unlikely to be favourable.

10.10.6 ICASA has not indicated that it considers national roaming to be a priority, or to form part of interconnection, which in Cell C's view, it does.

10.10.7 Cell C submits that it would be appropriate and proportionate to require that the price for national roaming provided by any licensee should be set at or no higher than the regulated MTR.

10.10.8 Cell C would welcome the opportunity to present to ICASA on this matter and urges ICASA to consider the regulation of this important form of access, as part of its suite of pro-competitive tools.

ANNEXURE A
Factors influencing a decision on MTRs and asymmetry in a selection of countries

The following benchmarks demonstrate that there is no "right" way to address market imbalances or ineffective competition, but that there are many factors that should be considered including specific market effects.

	Traffic imbalance	Smaller scale	Worse spectrum allocation	Low churn in the market	To encourage investment	To encourage competition	Other reasons affecting the operators
France	✓		✓	✓			
Norway					✓		
Belgium		✓	✓				
Turkey		✓	✓				
Italy		✓	✓		✓	✓	
Switzerland	✓	✓	✓	✓			
Ireland		✓				✓	
S. Korea	✓	✓	✓		✓		
Morocco						✓	Less market power
Algeria	✓						Operator 'position' in the market
Bahrain		✓	✓				WACC
Peru		✓	✓			✓	Integration with fixed incumbent /coverage
Colombia	✓	✓					Eases the club-effect
Nigeria		✓				✓	New entry
Ghana						✓	

[Source: Analysys Mason, Spectrum, Value Partners, Regulator's websites, Telegeography]

Country-by-country summaries of the reasoning and rates applied for asymmetric MTRs

The following countries are included in this section:
France
Belgium
Turkey
Italy
Switzerland
Ireland
Republic of Korea
Morocco
Algeria
Bahrain
Peru
Colombia
Nigeria
Ghana

France

Figure 1: Mobile termination rates in France [Source: PUBLICLY AVAILABLE - ARCEP, 2013]

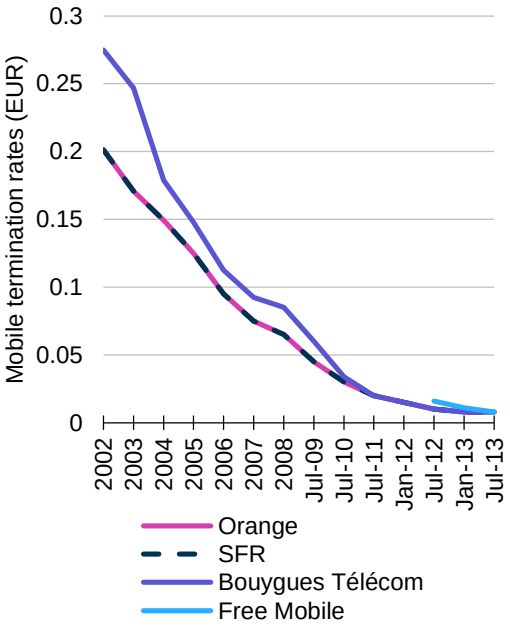
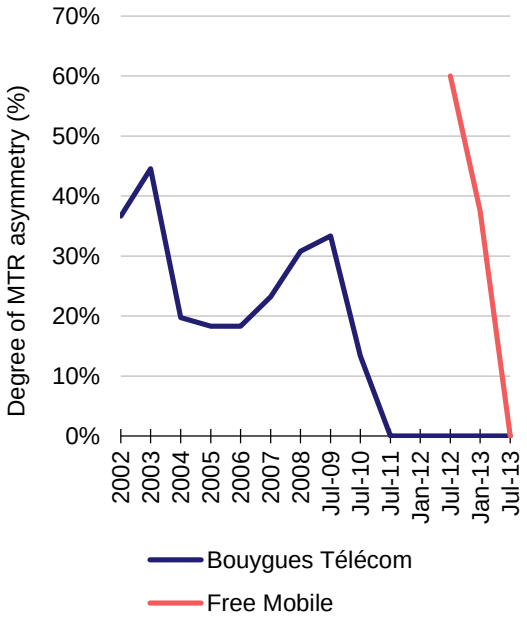


Figure 2: Degree of MTR asymmetry in France [Source: PUBLICLY AVAILABLE - Analysys Mason, 2013]



ARCEP introduced asymmetry in 2001 and has switched to symmetry in July 2012 at the behest of the European Commission (EC), which is currently recommending pure LRIC-based symmetric MTRs in all European Union member countries. ARCEP has only reluctantly agreed to follow the EC's Recommendation and has applied a number of remaining years of asymmetry, benefitting the newest entrant, Free/Illiad.[13]

ARCEP has introduced MTR asymmetry for new entrant Free (as well as Lycamobile and Oméa Telecom) in 2012 because "call termination rates will be temporarily higher than the long-run incremental cost" for the new entrants due to traffic imbalances. The higher MTR are supposed to

[13] Source on EC recommendation and ARCEP's response: ARCEP, press release (13th April 2012)

"offset" these additional costs temporarily to "establish a state of fair competition between the different players".[14]

Similarly, MTR asymmetry was originally introduced in 2001 to compensate the third mobile operator, Bouygues, for three disadvantages. First, the balance of mobile traffic favoured incumbents. Second, Bouygues was forced to use 1800MHz spectrum rather than the 900MHz spectrum used by Orange and SFR. Third, Bouygues had very limited scale compared to the incumbents and this was likely to prevail for the near future due to limited churn rates in the market.[15]

Belgium

Figure 3: Mobile termination rates in Belgium [Source: PUBLICLY AVAILABLE - BEREC, EC, 2013]

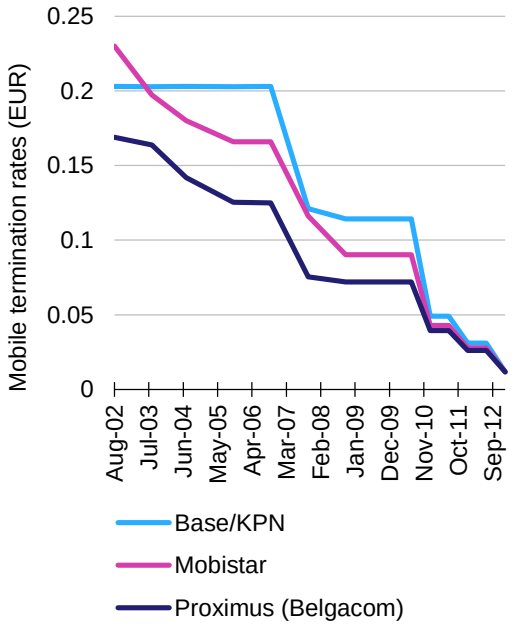
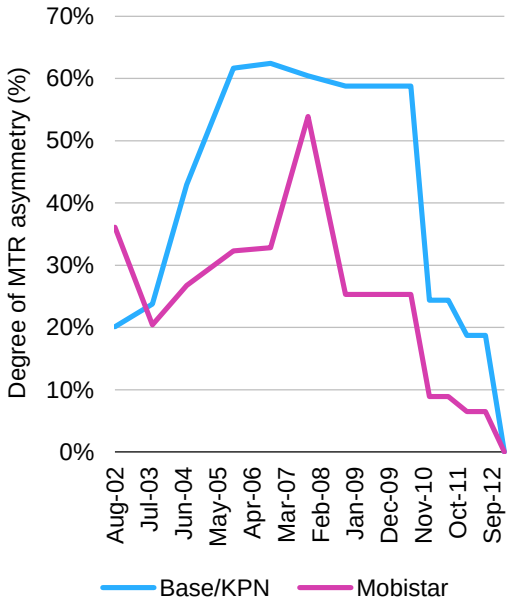


Figure 4: Degree of MTR asymmetry in Belgium [Source: PUBLICLY AVAILABLE - Analysys Mason, 2013]



The BIPT introduced asymmetrical MTR in 2001, with asymmetry peaking in 2008. In general, the BIPT has maintained relatively large and prolonged levels of asymmetry in favour of both smaller operators. In 2011, the BIPT mandated a rapidly declining glide path converging on a reduced symmetric MTR by January 2013. This glide path has been implemented by the BIPT in line with EC recommendations that asymmetry be used only temporarily and in the case of substantiated cost differences between operators.

Belgian operators' market shares have witnessed a persistent convergence during the period of MTR asymmetry and, following the removal of asymmetry, appear to have started diverging.

The BIPT's rationale for introducing asymmetric regulation was the late entry of KPN/Base into the duopolistic nature of the Belgian telecommunications sector at the time. Specifically, asymmetry was meant to compensate KPN/Base for its lower scale compared to the incumbent operators.[16]

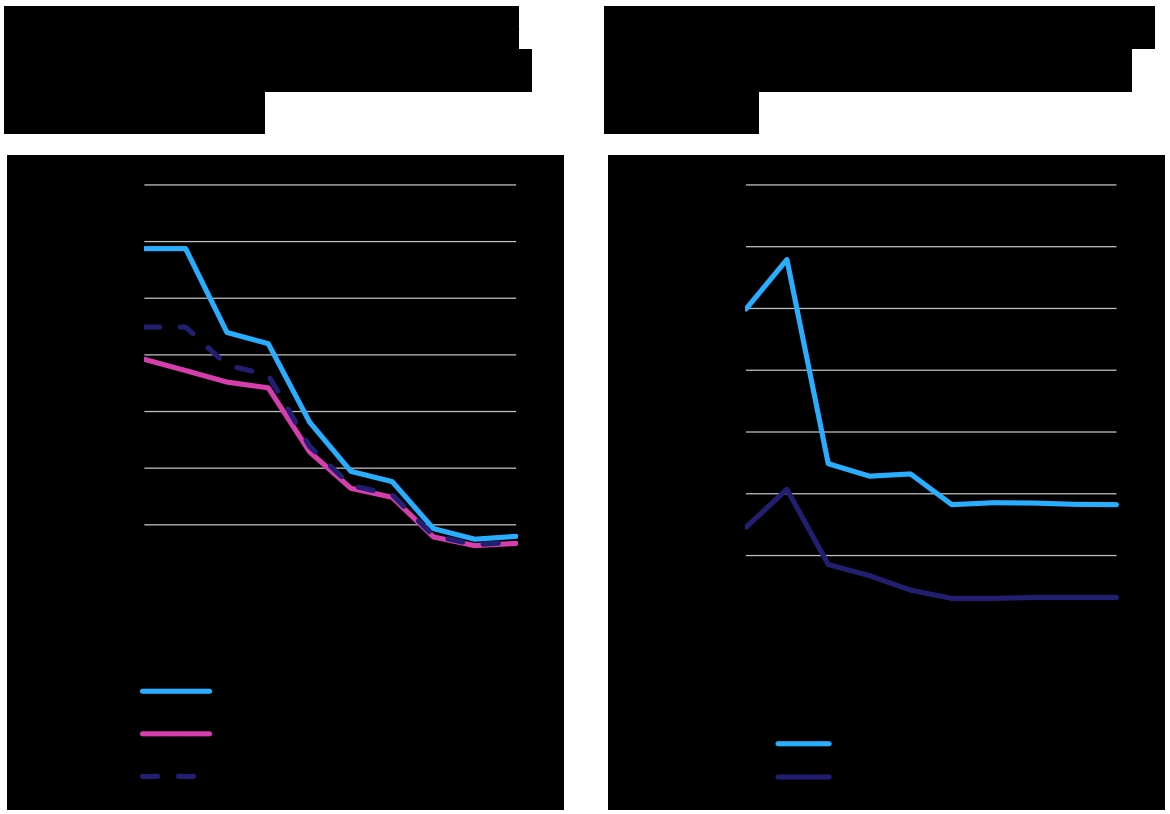
[14] Source: ARCEP, press release (13 December 2011)

[15] Source for ARCEP reasoning: Spectrum, Value Partners White Paper, "Asymmetrical Pricing for Mobile Termination Charges" (December 2, 2008), available at http://www.coai.com/White%20Paper%20on%20Asymmetric%20Termination%20Rates.pdf

[16] Source for the BIPT's rationale for asymmetry in 2002: Spectrum, Value Partners White Paper, "Asymmetrical Pricing for Mobile Termination Charges" (December 2, 2008), available at http://www.coai.com/White%20Paper%20on%20Asymmetric%20Termination%20Rates.pdf

The second reason the BIPT used to justify MTR asymmetry was because Belgacom and Mobistar had divided the 900MHz band up among themselves, forcing KPN/Base to use the 1800MHz band, which was more costly due to less advantageous propagation characteristics.[17]

Turkey



The ICTA has been using asymmetric MTR regulation for over 9 years. Asymmetry peaked in 2006 and has since stabilised at around 20% for Avea and 3% for Vodafone. Regarding the future development of MTR regulation, the ICTA has neither set a glide path towards symmetric rates nor put forth an explicit justification for the long-term usage of asymmetry. However, in line with EU accession negotiations, it is probable that Turkey will eventually align its mobile termination regime with the EC's Recommendation for symmetric MTRs.[18]

Turkish market shares have been slightly convergent over the last 10 years, but Turkcell remains by far the largest player with over 50% of market share, giving it a lead of 20 percentage points over the next largest operator, Vodafone. Avea, meanwhile, has consistently gained market share over the last 10 years.

[17] Source for the BIPT's rationale for asymmetry in 2002: Spectrum, Value Partners White Paper, "Asymmetrical Pricing for Mobile Termination Charges" (December 2, 2008), available at http://www.coai.com/White%20Paper%20on%20Asymmetric%20Termination%20Rates.pdf

[18] Source for the impact of EU-Turkey accession negotiations on MTR: CEPS Special Report, "EU-Turkey Accession Negotiations – Impact Assessment of Chapter 10 on Information Society and Media" (3 July 2009), page 67, available at http://books.google.co.uk/books?id=OBq-2WEOoJEC&pg=PA67&lpg=PA67&dq=turkey+mobile+termination+symmetry&source=bl&ots=1GHST_lnLM&sig=rHa44iz4qh_bH1byPzXYYBxRmkk&hl=en&sa=X&ei=QmH6UaPvI4TC7Ab6yIHQBw&ved=0CEwQ6AEwBQ#v=onepage&q=turkey%20mobile%20termination%20symmetry&f=false,

One of the reasons for the persistently high asymmetry in favour of Avea is that it is using more costly 1800MHz spectrum for its network while its competitors acquired 25-year licences in the 900MHz spectrum bands at the outset of operations.[19]

An implicit justification the ICTA appears to be using for asymmetry is the continued market share discrepancy between Turkcell and the other operators.[20]

Italy

Figure 7: Mobile termination rates in Italy [Source: PUBLICLY AVAILABLE - BEREC, EC, 2013]

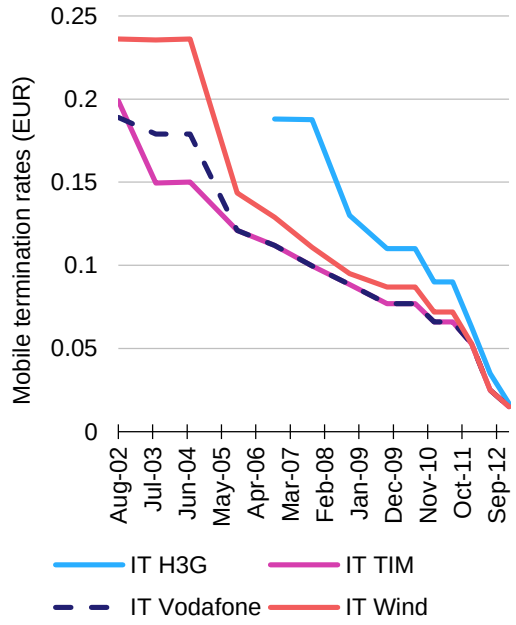
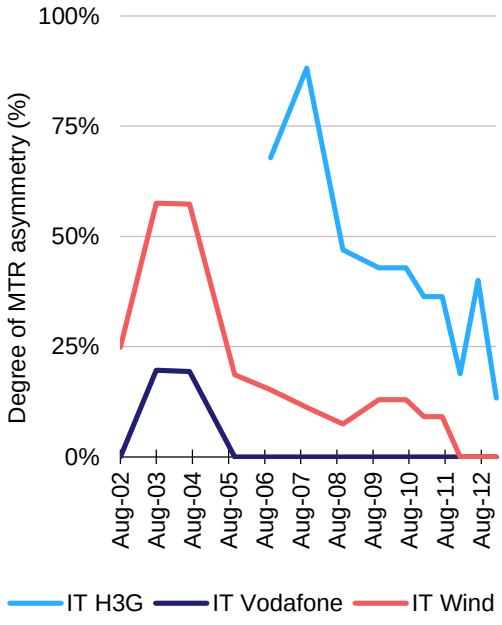


Figure 8: Degree of MTR asymmetry in Italy [Source: PUBLICLY AVAILABLE - Analysys Mason, 2013]



AGCOM has a long history of allowing asymmetric MTRs but is planning, in line with EC recommendations, to phase out asymmetry along a glide path that will grant Hi3G limited and decreasing asymmetry until 2014, when full symmetry will be established.[21] Market shares have been on a convergent trajectory for many years, but the sector still remains stratified, with TIM and Vodafone dominating the market.

The EC reminded AGCOM that "asymmetry, although permissible in exceptional circumstances, should be adequately and thoroughly justified". Further, the EC argued that any asymmetry in Italy is no longer justifiable because of the absence of "objective cost differences which are outside the control of the operators concerned". Also, as spectrum was recently re-assigned using a market-based allocation mechanism, any disadvantages an operator suffers related to its spectrum holdings is no longer exogenous and can therefore not serve as the basis for asymmetric MTRs.[22]

[19] Source: Medwell Journals (2011), available at http://www.medwelljournals.com/fulltext/?doi=ibm.2011.19.26

[20] Source: M. Selcuk Kahya, "Assessment of Significant Market Power for the Mobile Access and Call Origination Market in Turkey: Effects on Retail Competition" (September 2010), available at http://www.tk.gov.tr/kutuphane_ve_veribankasi/tezler/diger_tezler/M.Selcuk_KAHYA.pdf

[21] Source: Wireless Federation (6 May 2011), available at http://wirelessfederation.com/news/74530-agcom-proposes-reduction-in-mobile-termination-rates-to-2015-italy/

[22] Source for the EC's opinion on MTR in this regard: European Commission, "Workshop on the Implementation of the Law on Electronic Communications in administrative court proceedings" (January 2013), available at http://www.giustizia-

Originally, AGCOM introduced asymmetric mobile termination rates to promote competition by strengthening new market entrants (H3G) in the presence of objective differences in cost and scale between the newcomers and incumbents. In particular, AGCOM wanted to encourage investment by new 3G providers. Finally, AGCOM used asymmetric MTRs to compensate operators that were allocated 1800MHz instead of 900MHz spectrum, which is more efficient due to better propagation characteristics.[23]

Switzerland

Figure 9: Mobile termination rates in Switzerland [Source: PUBLICLY AVAILABLE - BEREC, University of Zurich, 2013]

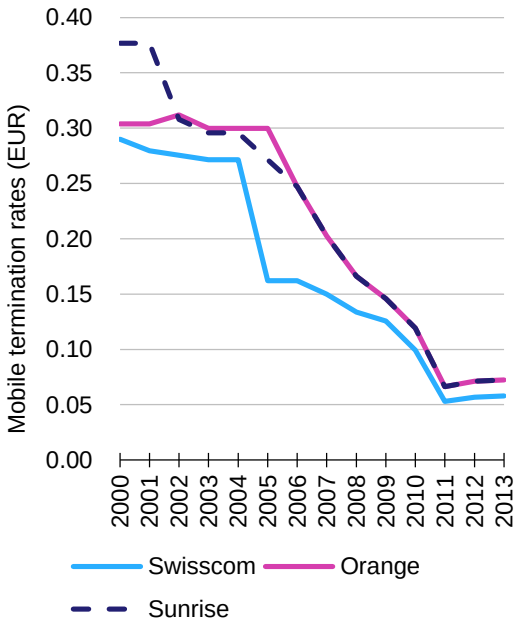
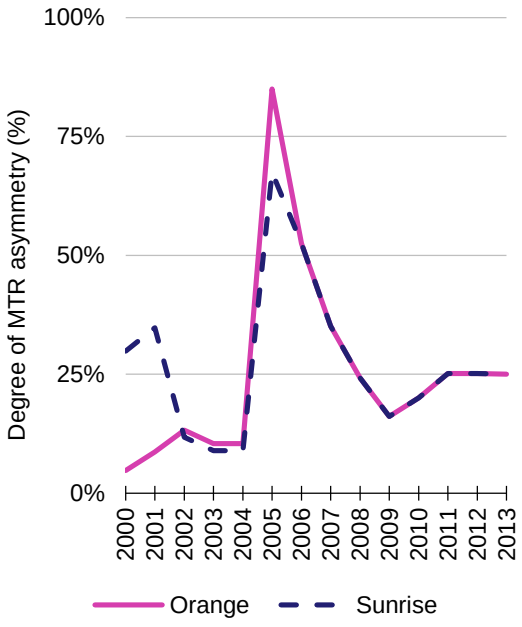


Figure 10: Degree of MTR asymmetry in Switzerland [Source: PUBLICLY AVAILABLE - Analysys Mason, 2013]



ComCom has long used asymmetric MTRs, with the degree of asymmetry reaching its maximum in 2005-2007. Since 2011, the degree of asymmetry has remained at 25% for both Orange and Sunrise. At this time, there is no evidence to indicate that ComCom might soon be changing to a symmetric mobile termination regime.

Despite over 13 years of asymmetric MTRs, Swisscom has remained overwhelmingly the largest player in the Swiss mobile market, with a market share of above 60%, compared to an approximate 20% market share for Sunrise and 18% for Orange. In general, market shares have remained virtually unchanged over the last 10 years.

ComCom favours the use of asymmetric MTRs for several reasons. First, upon entering the market as the first mobile provider, Swisscom could to pick and retain the highest value customers (e.g. corporate clients), leaving the remaining less profitable customer base for Orange and Sunrise. Second, Swisscom has such a high share of customers that, in combination with low churn, this makes it very hard for Orange and Sunrise to grow their subscriber bases. Third, Swisscom benefits greatly from its disproportionately large subscriber base because most of its traffic is on-net, thus reducing its interconnection payments to competitors. Orange and Sunrise, conversely, face higher

amministrativa.it/documentazione/studi_contributi/Perna_The_judicial_review_in_the_field_of_telecommunications.pdf

[23] Source on AGCOM's rationale: EUROPA, "Commissioner Reding meets the Italian Telecoms Regulator AGCOM" (16.10.2007), available at http://europa.eu/rapid/press-release_MEMO-07-410_en.htm; Spectrum, Value Partners internal report

interconnection payments because most of their clients' calls are off-net. Lastly, Swisscom was awarded spectrum in the 900MHz band, leaving Orange and Sunrise with spectrum in the 1800MHz band. This band is less efficient than the 900MHz band so that Orange and Sunrise had to invest more in their networks to achieve the same level of coverage as Swisscom.[24]

Ireland

Figure 11: Mobile termination rates in Ireland [Source: PUBLICLY AVAILABLE - BEREC, EC, 2013]

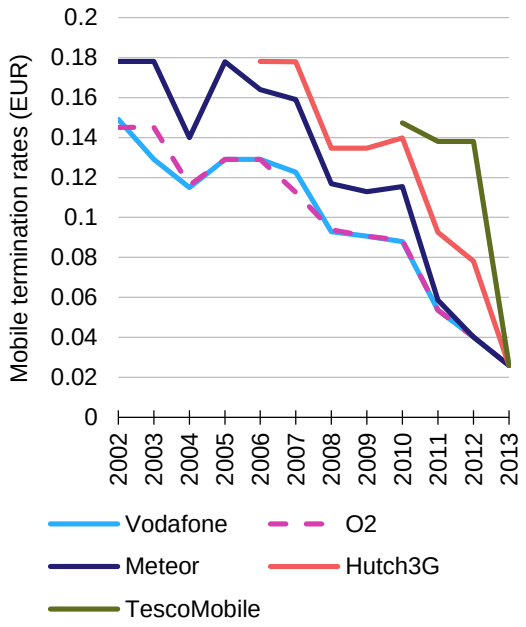
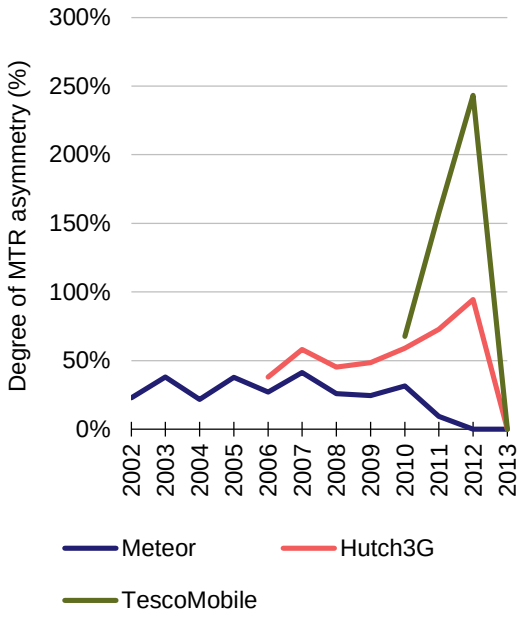


Figure 12: Degree of MTR asymmetry in Ireland [Source: PUBLICLY AVAILABLE - Analysys Mason, 2013]



ComReg has permitted asymmetric MTRs to exist in the market since 2002.[25] However, in line with EC recommendations, it has introduced symmetric MTRs in January 2013. While market shares have generally converged in the last 13 years, there remains a wide spread between operators, with Vodafone still controlling 40% of the market.
ComReg acknowledges the EC's recommendation that asymmetric MTR should only prevail when "there is clear evidence of objectively higher costs and a sufficient economic rationale that demonstrates that such asymmetry would be in the interests of competition and consumers in the long term". Further, ComReg mentions differences in scale as the main driver of higher costs for new entrants.[26]

ComReg adds that "asymmetrical MTRs may encourage or support entry and competition in the short term, but in the medium/long-term, symmetry (…) should facilitate greater competition". This, it argues, is because asymmetric MTRs provide new entrants with fair compensation for exogenous disadvantages; in the long-term, however, it encourages larger players to increase switching costs so as to prevent subscriber migration to operators with higher MTRs, which would entail rising

[24] Source for ComCom's reasoning: Spectrum, Value Partners White Paper, "Asymmetrical Pricing for Mobile Termination Charges" (December 2, 2008), available at http://www.coai.com/White%20Paper%20on%20Asymmetric%20Termination%20Rates.pdf
[25] Source: Spectrum, Value Partners White Paper, "Asymmetrical Pricing for Mobile Termination Charges" (December 2, 2008), available at http://www.coai.com/White%20Paper%20on%20Asymmetric%20Termination%20Rates.pdf
[26] Source for the entire paragraph: ComReg, "Voice Termination Rates in Ireland" (June 2012), available at http://www.comreg.ie/_fileupload/publications/ComReg1267.pdf

interconnection costs. ComReg defines this effect as a "tariff mediated network externality" for consumers.[27]

Republic of Korea

The KCC has set high asymmetric MTR in the past but has been gradually phasing these out over the last few years. Symmetric rates have now been adopted in 2013. LG UPlus has protested against this, citing the large difference in market share between it and its competitors while SK Telecom has welcomed the move to symmetry.[28] This difference in market share between the three operators has been remarkably persistent over the last 13 years, though LG UPlus was able to slightly gain market share over time at the expense of KT and SK Telecom.

At the time the KCC introduced asymmetric MTRs in 2002, it supported its decision by pointing out that the operators in question had different economies of scale: SK Telecom was the largest player with over 50% market share and thus had substantially lower network costs compared to the two new entrants. [29]

Additionally, there were differences in spectrum allocation between the operators. While SK Telecom was allocated CDMA-800 spectrum, the two new entrants were operating in the CDMA-1700 frequency band, giving them significantly higher network costs than SK Telecom.[30]
Finally, the KCC justified reducing MTR asymmetry in 2006 because it considered SK Telecom's network costs to have increased due to investing in 3G technology and due to traffic balances. [31]

[27] Source: ComReg position papers (2012), available at http://www.comreg.ie/_fileupload/publications/ComReg1267.pdf and http://www.comreg.ie/_fileupload/publications/ComReg12125.pdf
[28] Source for the entire paragraph: ECONSTOR, "Asymmetry of mobile termination rates and the waterbed effect" (July 2012), available at https://www.econstor.eu/dspace/bitstream/10419/60353/1/720906164.pdf
[29] Source: Spectrum, Value Partners White Paper, "Asymmetrical Pricing for Mobile Termination Charges" (December 2, 2008), available at http://www.coai.com/White%20Paper%20on%20Asymmetric%20Termination%20Rates.pdf
[30] Source: Spectrum, Value Partners White Paper, "Asymmetrical Pricing for Mobile Termination Charges" (December 2, 2008), available at http://www.coai.com/White%20Paper%20on%20Asymmetric%20Termination%20Rates.pdf
[31] Source: Spectrum, Value Partners White Paper, "Asymmetrical Pricing for Mobile Termination Charges" (December 2, 2008), available at http://www.coai.com/White%20Paper%20on%20Asymmetric%20Termination%20Rates.pdf

Morocco

Figure 13: Mobile termination rates in Morocco [Source: PUBLICLY AVAILABLE - ANRT, 2011, 2013]

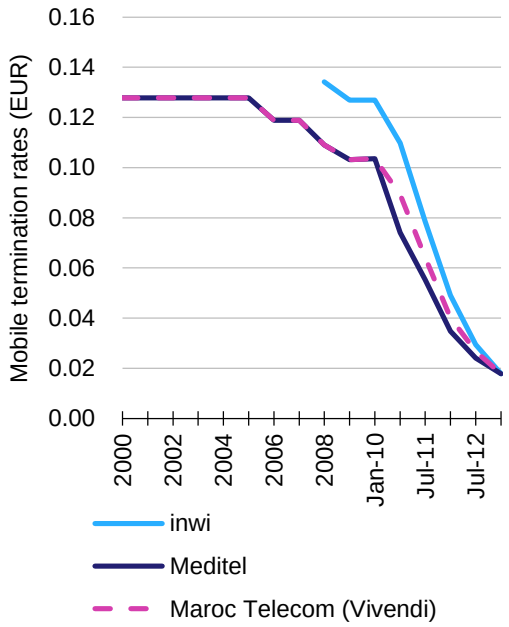
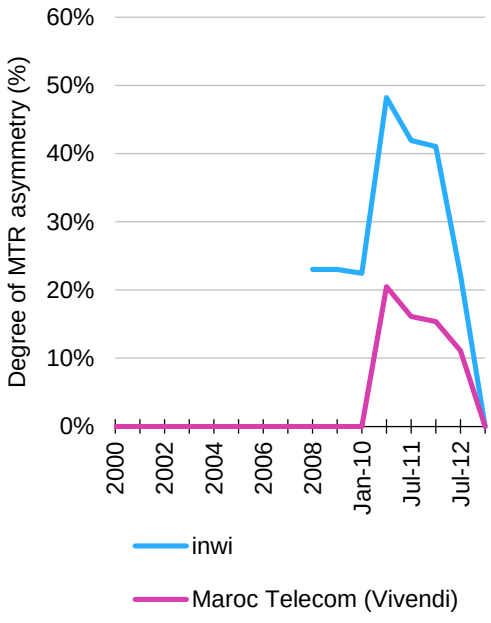


Figure 14: Degree of MTR asymmetry in Morocco [Source: PUBLICLY AVAILABLE - Analysys Mason, 2013]



The ANRT has had limited application of asymmetric MTR regulation, which was introduced in 2008 and has been phased out in January 2013 in favour of a steeply reduced symmetric rate. The largest asymmetries were present from 2010 onwards, when both Maroc Telecom and inwi stood to benefit. For inwi, this period corresponds to a phase of rapid market share gain at the expense of Maroc Telecom and Meditel.

Asymmetric rates have coincided with a general push by the ANRT to increase competition, such as the implementation of new fixed and mobile number portability legislation in May 2007. Asymmetric MTR regulation was introduced in parallel to provide a further boost to operators with less market power, specifically the new entrant inwi that began operations in 2007.[32]

[32] Source: International Telecommunications Union (ITU) (26 May 2010), available at http://www.itu.int/ITU-D/ict/newslog/Morocco+To+Cut+Call+Termination+Rates+By+6570+Over+3+Years.aspx; see also Telegeography

Algeria

Figure 15: Mobile termination rates in Algeria [Source: PUBLICLY AVAILABLE - ARPT, 2013]

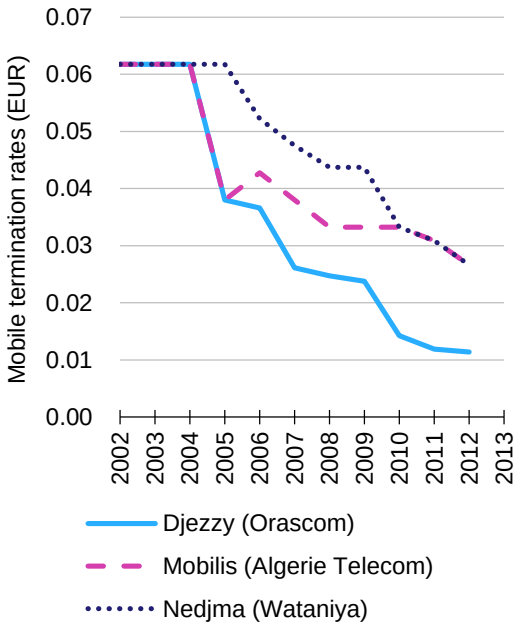
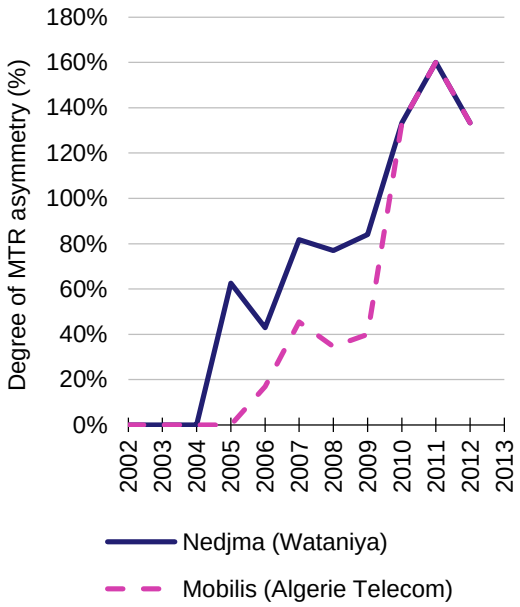


Figure 16: Degree of MTR asymmetry in Algeria [Source: PUBLICLY AVAILABLE - Analysys Mason, 2013]



The ARPT permitted asymmetric MTR in 2005, shortly after the market entry of the country's third mobile operator, Nedjma. In 2006, the ARPT imposed asymmetric rates in favour of the former mobile monopolist Algerie Telecom, following an inversion of the market shares of Algerie Telecom and Orascom between 2002 and 2004. Since then, Algerie Telecom was able to regain some ground vis-à-vis Orascom, but the former monopolist remains second largest to this day.

The ARPT has permitted asymmetry increasingly over the years and there is no indication that it intends to switch to a symmetric regime.

In the case of Orascom, the MTR asymmetry imposed on it by the ARPT has coincided with other forms of scrutiny. Orascom has been repeatedly fined and it has been subjected to a ban on foreign transfers since 2010, limiting its capacity to invest in its network.

Generally, the ARPT bases its regulated MTRs on the cost of call termination as derived using a LRIC methodology. Furthermore, asymmetry is justified as follows: "Levels of call termination rates are differentiated from one operator to another in Algeria, because of imbalances in traffic observed between operators and the position of these operators [in] the market".[33]

[33]Source: ARPT, Annual Report 2011 (2012), available at http://www.arpt.dz/fr/doc/pub/raa/raa_2011.pdf

Bahrain

Figure 17: Mobile termination rates in Bahrain [Source: PUBLICLY AVAILABLE - TRA, 2013]

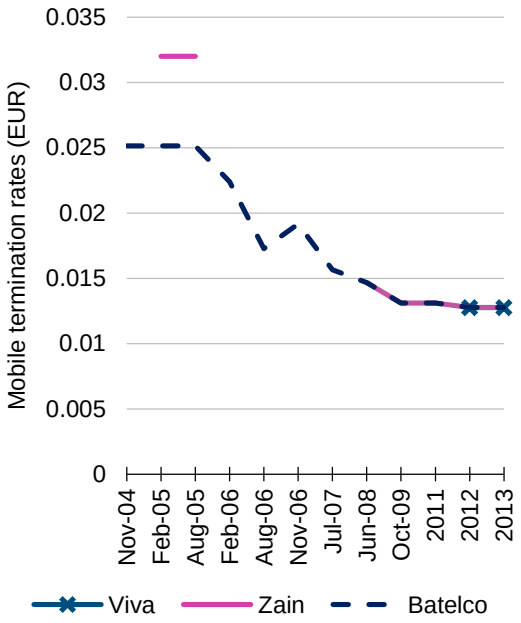
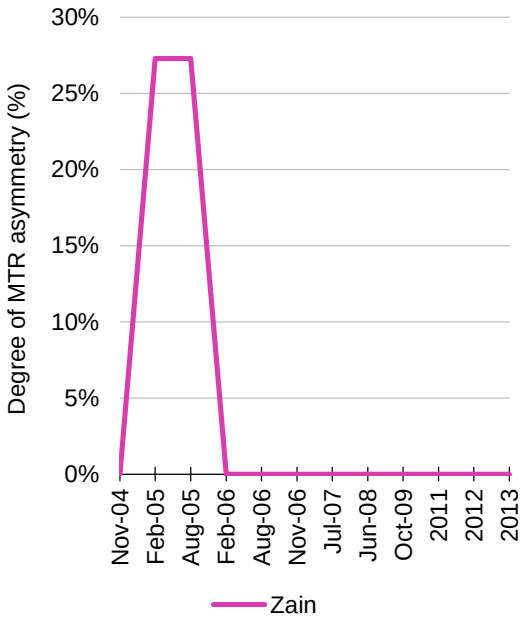


Figure 18: Degree of MTR asymmetry in Bahrain [Source: PUBLICLY AVAILABLE - Analysys Mason, 2013]



The TRA has only used asymmetric MTRs for one year, in 2005. However, reference interconnect offers (RIOs) in Bahrain have been asymmetric first in favour of Zain from 2006 to 2008, at which point it was declared to have significant market power (SMP) in the mobile termination market, and for Viva from 2010 to 2012, at which point it too was found to have SMP. Upon declaration of SMP, these operators were required to publish RIOs with "'fair, non-discriminatory' tariffs".[34] The declaration that Zain had SMP reflected the TRA's acknowledgement of its rapid growth since entering the market in 2004. The same reasoning applied to the pronouncement in 2012 that Viva had SMP.

Further, the TRA took care to make its treatment of Viva consistent with that of Zain, which remained unregulated "for a certain period until an adjustment of the regulatory framework was necessary".[35]

Generally, market shares in Bahrain have undergone a convergence, with new entrants generally faring well vis-à-vis the incumbent Batelco. In fact, the newest entrant, Viva, currently enjoys a greater market share than any of its competitors.

The brief interlude of asymmetry in 2005 was brought on by an appeal by Zain, which initially wanted a 5-year glide path of asymmetric MTRs. Batelco, by contrast, only supported very limited asymmetry for 9 to 12 months. The TRA decided on implementing asymmetric rates for so long as Batelco had an incumbency advantage over Zain, which the TRA estimated to be 2-3 years. The asymmetric MTR was, however, only set preliminarily for one year (i.e. from January 2005 to January 2006).[36]

The TRA's reasons for allowing asymmetry were that the newcomer Zain suffered exogenous disadvantages due to its higher cost of capital compared to Batelco, due to differences in spectrum

[34] Source: Telegeography (2013)
[35] Source: TRA, "The Regulation of Mobile Termination Services" (February 2010), Position Paper, available at http://www.tra.org.bh/en/pdf/FinalPositionPaper_onMTRsPublic.pdf
[36] Source: Spectrum, Value Partners White Paper, "Asymmetrical Pricing for Mobile Termination Charges" (December 2, 2008), available at http://www.coai.com/White%20Paper%20on%20Asymmetric%20Termination%20Rates.pdf

allocations and due to Batelco's near total control of the market.[37] Action was also prompted by TRA benchmarking that revealed the market share difference between Zain and Batelco to be far above the European norm. However, the TRA stated that the asymmetry applicable to Zain should not be proportional to the rate at which it gains market share. Its argument for this was that if Batelco was efficient enough it would be able to maintain market share, for which it should not be penalised.[38] In fact, the asymmetric rate imposed by the TRA was abandoned earlier than January 2006, as Batelco and Zain reached a commercial agreement in November 2005. The TRA explicitly endorsed this commercial arrangement as a replacement of the regulated MTR regime.[39]

Generally, the TRA opines that "MTRs should be symmetrical unless there are objective and material cost differences which are outside the control of operators". Also, "asymmetry can only be considered for a transitory period in two specific cases": incumbency advantage and differences in spectrum allocation. With regard to the first point, the TRA's states the following: "Entry into the mobile market involves large fixed costs, especially as a new entrant needs sufficient coverage to attract customers. However, a new entrant has initially a smaller customer base over which to spread its fixed costs. This results in higher unit costs and lower economies of scale achievable, at least initially. A new entrant may also command a higher cost of capital initially."[40]

The TRA also cautions that "asymmetric rates based on incumbency advantages can only be temporary as otherwise operators would have incentives to remain small". Conversely, it appears that asymmetric rates due to different spectrum allocations may be justified for longer. [41]

Peru

Osiptel has been using asymmetric MTRs since 2006 and has been steadily increasing the degree of asymmetry since then. Previously, Osiptel's approach to termination rates was comparatively hands-off. Interconnection rates were set amongst operators and, instead of mandating reductions in MTRs, Osiptel merely urged operators to voluntarily reduce rates by up to 30% in 2004/2005.[42]

In terms of market shares, Claro has gained significantly compared to the incumbent, Movistar, since beginning operations in 2001. Nextel, by contrast has remained steadily below 10% for the last 13 years.

Osiptel said its primary rationale for increasing asymmetry in 2010 was to create a more favourable competitive environment for smaller carriers.[43]

Osiptel also argued that there are significant differences between Peruvian operators in terms of coverage and scale. These differences directly affect the operators' operating costs, thereby justifying a differentiated termination regime based on detailed per-operator cost modelling.

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[37] Source: TRA, Determination (January 2005), available at http://www.tra.org.bh/EN/pdf/Determination_3_Jan_2005_En.pdf

[38] Source: Spectrum, Value Partners White Paper, "Asymmetrical Pricing for Mobile Termination Charges" (December 2, 2008), available at http://www.coai.com/White%20Paper%20on%20Asymmetric%20Termination%20Rates.pdf

[39] Source: TRA, Determination (November 2005), available at http://www.tra.org.bh/EN/pdf/FINAL_DETERMINATION_Amending_Determination_of_January_320.pdf

[40] Source: TRA, "The Regulation of Mobile Termination Services" (February 2010), Position Paper, available at http://www.tra.org.bh/en/pdf/FinalPositionPaper_onMTRsPublic.pdf

[41] Source: TRA, "The Regulation of Mobile Termination Services" (February 2010), Position Paper, available at http://www.tra.org.bh/en/pdf/FinalPositionPaper_onMTRsPublic.pdf

[42] Source: Telegeography (January 2004), available at http://www.telegeography.com/products/commsupdate/articles/2004/01/27/regulator-calls-for-voluntary-30-cut-in-fixed-to-mobile-termination-charges/

[43] Source: US Department of State (2012), available at http://www.state.gov/e/eb/rls/othr/ics/2012/191217.htm; see also US Government (date unknown), available at http://www.ustr.gov/sites/default/files/Peru_0.pdf; see also El Comercio (August 2010), available at http://elcomercio.pe/economia/626213/noticia-costo-llamadas-celular-celular-bajara-partir-octubre

Additionally, Osiptel noted that the incumbent, Movistar, enjoys advantages derived from its deep integration with the main fixed-line operator. A last consideration was that operators had different spectrum allocation, disadvantaging the new entrants vis-à-vis Movistar.[44]

Osiptel has indicated in 2010 that it believes asymmetry will be justified for at least nine more years, i.e. until at least 2019.

Colombia

Figure 19: Mobile termination rates in Colombia [Source: PUBLICLY AVAILABLE - CRC, 2012]

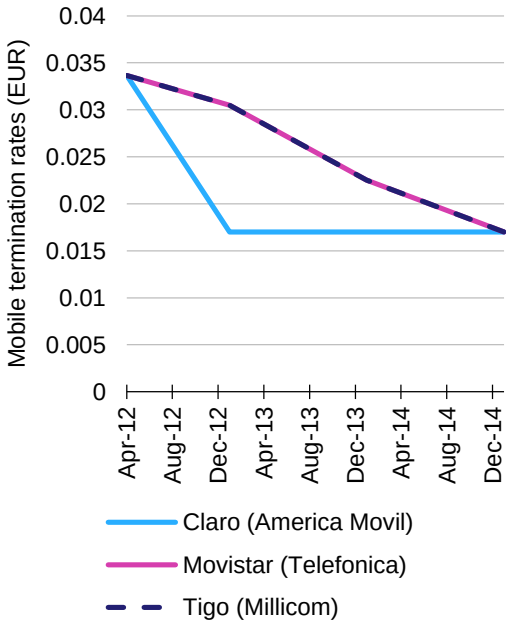
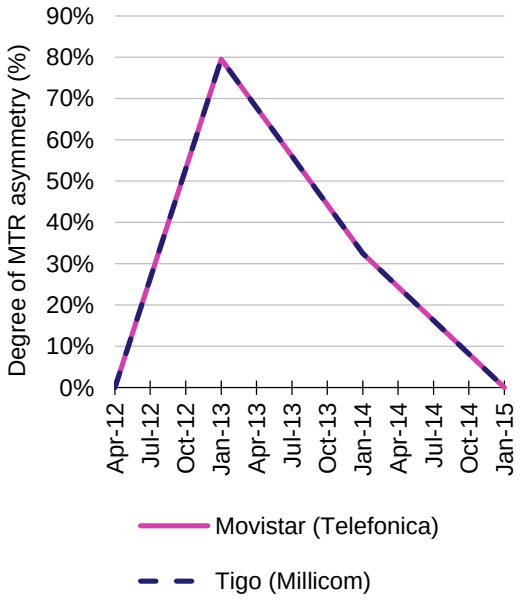


Figure 20: Degree of MTR asymmetry in Colombia [Source: PUBLICLY AVAILABLE - Analysys Mason, 2013]



The CRC has only very recently started using asymmetric MTR regulation. In April 2012 it mandated a three year asymmetric MTR glide path towards a substantially reduced symmetric termination rate in Jan 2015.

The Colombian telecommunications market has been dominated by Claro for the last 12 years, which replaced Movistar as the largest operator in 2001. The latest major entrant, Tigo, has failed to gain significant traction and has been holding 10% market share since it started operations in 2003.

Until 2007, interconnection rates in Colombia were established through trade agreements between mobile operators. In that year, however, the CRC could show that operators were agreeing access charges above efficient rates, had no incentive to reduce interconnection rates and were incentivised to expand so as to reduce competition from new entrants. As a result, the CRC proposed to regulate access charges to the mobile network, establishing symmetrical interconnection rates for all operators from 2007 to 2012. The CRC used a pure LRIC model to set these tariffs, in line with the provisions of the EC in its Recommendation from May 2009.

The decision of the CRC in 2012 to impose asymmetric rates for a transitional period of three years had two reasons. On the one hand, the differential between on-net and off-net rates charges by operators was so extreme as to induce a “club” effect, where subscribers seek to remain on the

[44] Source: US Department of State (2012), available at http://www.state.gov/e/eb/rls/othr/ics/2012/191217.htm; see also US Government (date unknown), available at http://www.ustr.gov/sites/default/files/Peru_0.pdf; see also El Comercio (August 2010), available at http://elcomercio.pe/economia/626213/noticia-costo-llamadas-celular-celular-bajara-partir-octubre

operators with the largest networks. On the other hand, the discrepancies in market shares meant that this "club" effect would severely disadvantage Tigo and Movistar at the expense of Claro. The CRC will consider the effects of the current asymmetries upon completion of the glide path in 2015.

Nigeria

The NCC has recently implemented two consecutive asymmetric MTR glide paths. The first started in December 2009 and ended with a symmetric rate three years later in December 2012. The second began immediately after that and is scheduled to converge to a symmetric rate in April 2015. During the first asymmetric glide path, operators qualified for asymmetry if they were new entrants, defined as having been in the market for less than four years. The operators that qualified under these terms were Etisalat, Multi-Links, ZOOMobile and Visafone.

During the second asymmetric glide path, operators qualified for asymmetry if they were either a new entrant, defined as being in the market for less than 3 years, and/or if they had a market share below 7.5%. Consequently, ZOOMobile, Visafone, Starcomms and Multi-Links are currently benefitting from this regime.[45]

The Nigerian mobile telecommunications market is highly fragmented. Of the 5 new entrants to commence operations after 2004, only Etisalat has managed to gain significant market share. Multi-Links, Starcomms, Visafone and ZOOMobile meanwhile have remained below 5% market share. At the same time, MTN remains the largest player the market, with Airtel and Glo Mobile roughly half the size of the main operator. In the last 5 years, there has been only limited market share convergence.

The first glide path (2010-2013) was intended to "give new entrants sufficient opportunity to establish themselves and to compete with other operators based on symmetric termination rates as of 2013". This is based on the recognition that "new entrants initially have very high unit costs". At the same time, the NCC notes that "this is the nature of almost every business plan" and that "no full compensation on the basis of low volume and (high) unit costs should be expected by new entrants".

Further, the NCC has insisted that asymmetric rates should not be justified based on differences in efficiency, as this would discourage improvements in efficiency by operators. Rather, the relevant differences are those in operating costs between new entrants and incumbents based on differences in scale. Finally, the NCC has pointed out that asymmetry can only be a temporary measure to ease market entry, not a permanent form of support for small operators.[46]

The NCC has pledged to monitor the effects of current asymmetries and may decide to extend asymmetry in 2015 the way it did in 2013.[47]

[45] Source for glide path details: Telegeography (2013)
[46] NCC, "Determination of Voice and SMS Interconnection Rates in 2009" (2009), available at http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=1029&Itemid=210
[47] NCC, "Determination of Voice Interconnection Rates 2013" (2013), available at http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=1029&Itemid=210

Ghana

Figure 21: Mobile termination rates in Ghana [Source: PUBLICLY AVAILABLE - NCA, 2013]

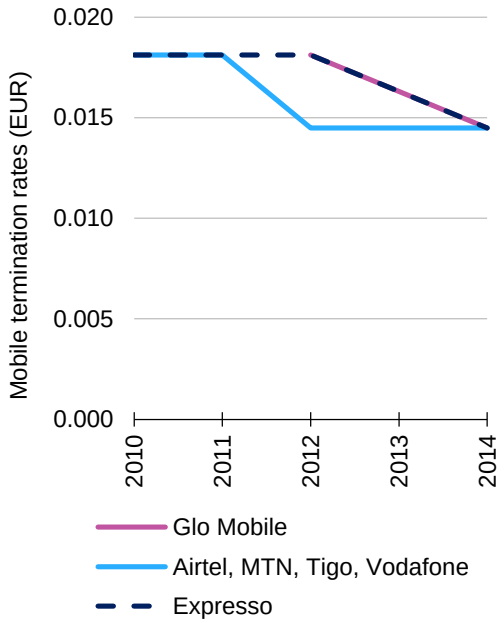
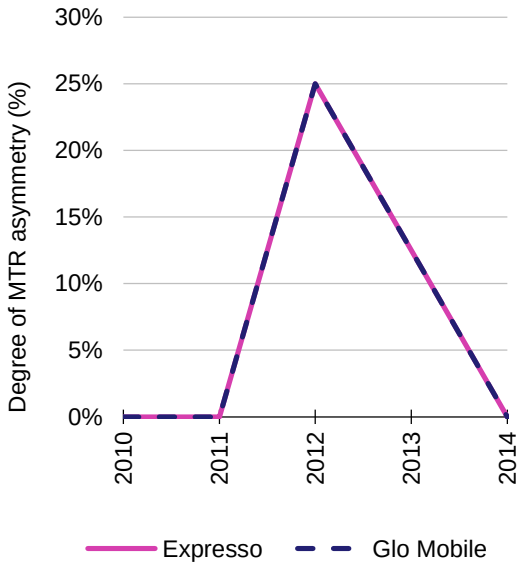


Figure 22: Degree of MTR asymmetry in Ghana [Source: PUBLICLY AVAILABLE - Analysys Mason, 2013]



The NCA has recently embarked on a three-year asymmetric MTR glide path, starting from symmetric rates in 2012 and reaching again symmetric rates in 2014. Asymmetry applies only to "new entrants as well as operators with less than 5% subscriber market share". Hence, only Glo Mobile (the newest entrant) and Kasapa Telecom (Expresso, with a market share below 5%) are currently enjoying asymmetric rates. The NCA also states that if an operator exceeds 5% market share at any point during the MTR glide path, it will cease to receive the beneficial asymmetric rates.[48]

The mobile telecommunications market in Ghana is dominated by the incumbent MTN, though its market share has been consistently decreasing for the last 8 years. Vodafone is the second largest operator in the country with 21% market share, followed by Airtel and Tigo at approximately 12% and Glo Mobile, the newest entrant, at 8%. Expresso's market share, after attaining 5% from 2005 to 2009, has been in steady decline.

The NCA introduced asymmetric rates as "a catalyst to further deepen competition in the market".[49]

[48] Source: NCA, "NCA ANNOUNCES NEW INTERCONNECTION RATE REGIME FOR THE PERIOD 2012 – 2014" (date unknown), available at http://www.nca.org.gh/downloads/Interconnect_News.pdf
[49] Source: NCA, "NCA ANNOUNCES NEW INTERCONNECTION RATE REGIME FOR THE PERIOD 2012 – 2014" (date unknown), available at http://www.nca.org.gh/downloads/Interconnect_News.pdf

ANNEXURE B
A summary of regulatory intervention in setting prices

Year	Activity
1994-1996	• Launch of MTN and Vodacom, their licences provided that they could not raise tariffs by more than CPI per year unless the Postmaster-General provided otherwise. Base tariff rates were annexed to the licences • Negotiations begin with Telkom regarding interconnection terms
1999	• ICASA begins a review of mobile rates which is never finalised • Draft interconnection and facilities-leasing guidelines are published
2000	• SATRA and the IBA merged to form ICASA in terms of the ICASA Act, 2000 • Final interconnection and facilities-leasing guidelines published with a declaration that Telkom is a "major operator"
2001	• The Minister issued policy directions under the T Act intended to give all 3 mobile operators 1800MHz spectrum by 2002. The policy directions also provided that a second fixed operator would be licensed as an SNO in 2001 • T Act is amended • Regulatory accounts to be published by Telkom under COA/CAM although other operators were exempted for a period of time • Cell C is licensed – ICASA decides not to apply rate regulation although Cell C had to file its tariffs (see rate regulation in MTN and Vodacom's licences) • CST obligations included in Cell C's licence differed from those in the amended licences (amended in 2002) of MTN and Vodacom (any increases in tariffs for CSTs had to be approved by ICASA) • 1800MHz and 3G spectrum are awarded to all operators provided they comply with additional universal service and access obligations
2002-2004	• Amendments to the interconnection and facilities-leasing guidelines (supplementary guidelines) are published which enables major operators to apply to have the designation removed • Cell C applied to have MTN and Vodacom declared major operators but withdrew the application as ICASA issued a consultation on this but even that was later withdrawn. ICASA also consulted on the introduction of a LRIC pricing regime which was to apply to Major Operators after a transitional period • In 2004 as a result of an amendment to the T Act, mobile operators, VANS and Neotel (and Sentech) are declared public operators for purposes of the interconnection guidelines and obliged to make telecoms facilities available to interconnection seekers in accordance with the charging mechanism described in the 2002 Guidelines • Mobile operators have to file tariffs with ICASA for approval • Amendments made to MTN and Vodacom licences (i) to rate regime – productivity factor set to 0 and applied to each tariff plan, but the price cap mechanism was otherwise as for

	Telkom (no control on basket tariff plans by MNOs) (ii) to CST charging (not for Cell C at the time) – any increase in CST rates had to be approved by ICASA, if interconnection rates and other fees payable by MNOs to Telkom decreased then CST rates had to decrease
2004	• COA/CAM regulations become applicable to MTN and Vodacom who are supposed to work out a schedule for compliance with ICASA • Under-serviced area licences (USALs) were made available to 7 applicants • Treasury published its views on the pricing in telecoms and concluded that ICASA needed to be more pro-active/conduct proper review particularly of mobile pricing
2005	• Further draft interconnection guidelines were published for comment in January • MNP introduced under regulations with switch-on date in 2006 • Another 14 USALs were launched • Private network operators and VANS were allowed to resell network services and VANS were allowed to offer voice services • ICASA consulted on whether or not to declare MTN and Vodacom "major operators" under the 2002 interconnection guidelines (abandoned this because of the pending introduction of the ECA)
2007	• Draft essential facilities regulations published for comment • Wholesale call termination market definition report published
2008	• Draft interconnection and facilities-leasing regulations published
2009	• Revised interconnection and facilities-leasing regulations published • Parliamentary hearings take place on the high cost to communicate
2010	• Licensees voluntarily drop termination rates from 1 March 2010 to 89c • Interconnection and facilities-leasing regulations published in final form • Guidelines for market reviews published by ICASA in March • Draft call termination regulations published in April • Hearings on call termination held in June • Final call termination regulations published in October • Remedies included MTR and asymmetry applicable over a 3-year glide path; reference interconnection offers to be produced by each of MTN, Vodacom and Telkom; and cost accounting regulations to be published • Official 8ta launch in October (no licence is required as they are a business unit of Telkom)

2011	• The first phase of the MTR glide path is introduced on 1 March (at 73c /65c peak and off-peak)
2012	• Cell C launches 99c flat rate in May for prepaid customers which is extended to contract customers in July • The second phase of the MTR glide path is introduced on 1 March 2012 (at 56c/52c peak and off-peak) • Parliamentary hearings are held in November regarding the continued high cost to communicate
2013	• Cell C lobbies ICASA to halt the glide path • At end of February ICASA announces a market review to take place • The third phase of the MTR glide path is introduced on 1 March 2013 at 40c flat rate for on and off-peak calls

ANNEXURE C
Legal sources to indicate cost-based/cost-oriented calculations are not required for asymmetry

Source	Provision	Application and observations
Early interconnection guidelines under the Telecommunications Act, 2003 and 2005	"Charges for interconnection must be structured to match the pattern of underlying costs incurred…"	These no longer apply but at the time this applied to all operators regardless of whether an operator was a "major operator" or not (now this would be SMP)
Chart of Accounts and Cost Accounting Manual (2004) (COA/CAM Regulations)		Included for completeness only – no specific requirement regarding pricing other than an obligation to prepare "regulatory accounts" (Telkom has been obliged to do this since 2002 with a price cap imposed by way of basket of services formulae)
Draft Essential Facilities Regulations, 2007	Regulation 7: (1) A person in control of access to an essential facility must provide such access at a charge which is based on the forward-looking long-run average incremental costs of an efficient operator providing access to the essential facility, unless the person in control of access to an essential facility and the person who requests access to an essential facility agree on another basis for the determination of access charges."… (5) "….a person in control of access to an essential facility must charge an average unit cost, or the fully distributed unit cost standard as defined in COACAM Regulations to a person who requests access to an essential facility".	Never finalised

Draft Call Termination Regulations, 2010	Regulation 9: cost-oriented prices	The explanatory note to the draft regulations discusses the principle of cost-orientation at section 3.4.3.2 and following, as underlying a behavioural remedy that applies to all operators with SMP in the relevant market (which includes Cell C for call termination)
Guidelines on conducting a Market Review, 2010	Section 3.3 refers to "effective competition" and claims that this will exist when (among other things), "any variation in price in products or services is a result of differences in the cost of provision of characteristics inherent to the product, such as quality" Section 3.4.2 refers to "price controls" and provides that they may be necessary where there is ineffective competition and the form of regulatory action would be determined on a case by case basis, including "the relevant costing methodology to be applied"	Not exactly a reference to cost-oriented or cost-based, but close. The references are made in the context of remedies to be imposed on operators with market power – which would include Cell C for call termination
Final Call Termination Regulations 2010	Regulation 7(5)(b): Price Control: Cost-oriented pricing Regulation 7(5)(a): Publication of a RIO	**Both obligations are only applicable to MTN and Vodacom under regulation 7(4)(a).** Note: Annexure A which describes the contents of the RIO that are required, includes a section on charging that states under the heading "Schedule of charges for an interconnection services" the following: "[Include] full charge for each interconnection service. Where relevant the charges should be broken down into or built up from the charges for the network components, include an indication of any surcharges, [and] include an indication of any charging unit/s (eg per second)

Directive 97/33/EC on Interconnection and Access	The cost-orientation obligation applied under this directive **only to operators with significant market power**	
Directive 2002/19/EC Access and Interconnection Directive	The obligation to maintain cost-orientation that may be **imposed on operators with market power** is to be maintained but as a maximum (to encourage lighter touch regulation, acknowledging the level of competition in the market that has been achieved). Article 13 provides in this regard that "Where an operator has an obligation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs including a reasonable rate of return on investment shall lie with the operator concerned**. For the purpose of calculating the cost of efficient provision of services, national regulatory authorities may use cost accounting methods independent of those used by the undertaking. National regulatory authorities may require an operator to provide full justification for its prices, and may, where appropriate, require prices to be adjusted**"	Article 13 confirms this but also provides that "National regulatory authorities shall take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account the risks involved". *Interestingly as regards our concerns on process, preamble 15 records that "The imposition of a specific obligation on an undertaking with significant market power does not require an additional market analysis but a justification that the obligation in question is appropriate and proportionate in relation to the nature of the problem identified"*

Annexure D
Cell C's sSuggested amendments to the Draft Regulations

THIS SECTION IS INTENDED TO BE MARKED UP

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

1. DEFINITIONS

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

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

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

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

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

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

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

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

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

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

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

2. PURPOSE OF REGULATIONS

The purpose of these Regulations is to: -

(a) Define and identify the wholesale call termination markets that exist within the Republic of South Africa based on trends post 2010;

(b) Set out the methodology used in the review of the effectiveness of competition in such markets post 2010;

(c) Declare licensees that have SMP in terms of paragraphs (a) and (b) above;

(d) Set out the pro-competitive measures to be imposed to remedy market failure in the relevant markets found to have ineffective competition;

(e) Set out the schedule for periodic review of the relevant markets and the effectiveness of competition in such markets; and

(f) Provide for the enforcement of these Regulations.

3. MARKET DEFINITION

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

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

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

(i) The market segment for wholesale voice call termination to a fixed location within an ON area code; and

(ii) The market segment for wholesale voice call termination to a fixed location between ON area codes.

4. METHODOLOGY

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

(a) the identification of relevant markets and their definition according to the principles of the Hypothetical Monopolist Test, taking into account the non-transitory (structural, legal, or regulatory) entry barriers to the relevant markets and the dynamic character and functioning of the relevant markets;

(b) the assessment of licensees' market shares in the relevant markets; and

(c) the assessment on a forward-looking basis of the level of competition and market power in the relevant markets.

5. EFFECTIVENESS OF COMPETITION

Pursuant to regulation 4, the Authority has reviewed its 2010 analysis of the effectiveness of competition in the markets and determined that competition in the wholesale voice call termination markets, as defined in regulation 3, is still ineffective~~owing to inefficient pricing~~.

6. SMP DETERMINATION

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

7. PRO-COMPETITIVE TERMS AND CONDITIONS

(1) Based on t~~T~~he Authority's review of its 2010, it finds there is still ineffective competition ~~has identified the following market failures~~ in the respective wholesale voice call termination markets, which results in:

(a) a lack of the provision of access;

(b) the potential for discrimination between licensees offering similar services;

(c) a lack of transparency; and

~~(a)~~(d) inefficient pricing.

~~(1)~~(2) All licensees must comply with the following pro-competitive terms and conditions to overcome the market failures identified in sub regulation (1):

(a) Charge ~~fair and reasonable~~the prices for wholesale voice call termination consistent with Annexure A.

~~(2)~~(3) The Authority has determined that additional pro-competitive terms and conditions are necessary to correct the market failures identified in regulation 7(1) which are to be imposed on the following licensees:

(a) Licensees that have historically benefitted from ~~reciprocal treatment by the Authority in the allocation of~~ the allocation of more efficient lower band spectrum; and

~~(a)~~(b) Licensees that ~~benefit from economies of scale and scope in maintaining a share of total minutes terminated in the respective markets of greater than 20 per cent as of December 2012~~have more than 25% of the total revenue market share.

~~(3)~~(4) The Authority determines that the following licensees have the characteristics listed in sub regulation (3):

(a) Market 1:

MTN Pty Ltd (MTN)
Vodacom Pty Ltd (Vodacom)

(b) Market 2:

Telkom SOC SA Ltd

~~(4)~~(5) Additional pro-competitive terms and conditions

(a) Price Control: Cost-oriented pricing

i. This obligation is imposed on those licensees listed in sub regulation (4)

ii. For the period 01 March 2014 to 01 March ~~2016~~2018, the licensees identified in sub regulation(4)(a) must charge the wholesale voice call termination rates to a mobile location as specified in Table 1:

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

Period Rate	Rate
1 March 2014	R 0.20
1 March 2015	R0.15
1 March 2016-2018	R0.10

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

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

Period	Within ON area code	Between ON area code
1 March 2014 to 1 March 2018~~6~~	R0.10~~2~~	R0.10~~9~~

(b) Bottom-up LRIC Cost Model

i. This obligation is imposed on those licensees listed in sub-regulation (4).

ii. Such licensees are obliged to provide any information the Authority deems necessary to develop ~~such~~ a Cost Model.

iii. Information requests are to be complied with within 30 days of receiving the request.

iv. The Authority may amend existing rates based on its schedule for review or revision of markets ~~the outcomes of this model~~.

8. SCHEDULE FOR REVIEW OR REVISION OF MARKETS

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

9. CONTRAVENTIONS AND PENALTIES

(1) A licensee which fails to comply with regulation 7(2) is liable to a fine of Five Hundred Thousand Rand (R 5 000 000.00).

(2) A licensee which fails to comply with regulation 7(5)(a), or (b) is liable to a fine not exceeding One Million Rand (R ~~1~~ 10 000 000.00).

10. SHORT TITLE AND COMMENCEMENT

These Regulations are called the ~~Draft~~ 2013 Call Termination Regulations and will become effective upon date of publication. ~~All Stakeholders have 30 days to submit written comments on the draft regulations.~~

Appendix A: ~~APPLICATION OF THE FAIR AND REASONABLE CONDITIONS~~

1. ~~PRINCIPLES OF IMPLEMENTATION OF FAIR AND REASONABLE~~ PRO-COMPETITIVE CONDITIONS

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

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

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

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

2.1 Spectrum allocation. A licensee must justify why it is adversely affected by current spectrum allocation or may rely on its previous justification provided to the Authority in 2010.

2.2 Economies of scale and scope based on the share of total ~~minutes terminated~~revenue in the relevant market. A licensee qualifies, for a period of 5 years from the 1st March 2014, for ~~an~~ the asymmetric rate if it has less than ~~20~~25 per cent of total ~~terminated minutes~~revenue in the relevant market as of December 2012.

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

~~2.4~~2.3 Licensees with a revenue market share of greater than ~~10~~25% after five years have passed are obliged to charge symmetrical rates.

~~2.5~~2.4 A licensee may only qualify for an asymmetric rate if both factors are applicable.

~~2.6~~2.5 A licensee who qualifies for an asymmetric rate in Market 1 may charge a maximum rate~~)~~ according to the following table:

Table A1: Maximum Asymmetry ~~Rate~~

	Maximum ~~rate~~ that may be charged above the MTR
~~Current~~	~~R 0.44~~
01-Mar-14	R 0.~~39~~30
01-Mar-15	R 0.~~33~~30
01-Mar-16	R 0.~~26~~30
01-Mar-17	R 0.~~20~~30
01-Mar-18	R 0.~~14~~30
01-Mar-19	R 0.~~10~~30

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

~~Economies of scale and scope based on the share of total minutes terminated in the relevant market. A licensee qualifies, for a period of 5 years from the 1st March 2014, for an asymmetric rate of 10% above the rates specified in Table 2 of these Regulations if it has less than 20 per cent of total terminated minutes in the relevant market as of December 2012.~~

~~3.2 Thereafter, a licensee qualifies for an ongoing asymmetric rate of 10% if it has a market share of less than or equal to 10 per cent of total terminated minutes in the relevant market.~~

~~3.3 Licensees with a market share of greater than 10% after five years have passed are obliged to charge symmetrical rates.~~

Explanatory Note to the Draft Call Termination Regulations

1. Introduction

1.1 The Authority introduced cost-oriented termination rates through the Wholesale Voice Call Termination Regulations (GG 33698) in October 2010.

1.2 The Authority has reviewed these regulations in line with Section 67(8) of the Electronic Communications Act, no 35 of 2006 (the "ECA"), where Section 67(8) states the following:

> *67(8) Review of pro-competitive conditions:*
>
> *(a) Where the Authority undertakes a review of the pro-competitive conditions imposed upon one or more licensees under this subsection, the Authority must-*
>
> *(i) review the market determinations made on the basis of earlier analysis; and*
>
> *(ii) decide whether to modify the pro-competitive conditions set by reference to a market determination;*

1.3 The Authority informed stakeholders of its intention to conduct such a review using the Request for Information published in Government Gazette 36532 on the 4th of June 2013.

1.4 This explanatory note is structured as follows:

1.4.1. Market definition

1.4.2. Determination of Significant Market Power

1.4.3. Evaluation of the effectiveness of competition

1.4.4. Pro-competitive remedies

2 Market Definition

2.1 After analysis of the information requested from licensees by the Authority, the Authority sees no need to amend the definitions of the markets as determined in 2010 because there have been no changes to the structural, legal or regulatory barriers to entry or to the dynamic character and functioning of the markets. ~~there is no technical change that changes the characteristics of termination to a mobile versus fixed location~~[50]

2.2 Therefore the market definitions remain the same:

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

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

~~2.2.2.1. The market segment for wholesale voice call termination to a fixed location within the ON area code~~

~~2.2.2.2. The market segment for wholesale voice call termination to a fixed location between ON~~

[50] See page 48 of Government Gazette 33121 of 16 April 2010~~9~~.

~~area codes~~[51]

3. Determination of Significant Market Power

3.1 In 2010 the Authority determined that:

"each ECNS and ECS licensee that offers wholesale voice call termination services has SMP in its own market""[52]

3.2 After analysis of the information requested from licensees by the Authority, the Authority sees no reason to amend this determination, as the nature of voice call termination has not changed.[53]

4. **Determination on the Effectiveness of Competition**

4.1 In 2010 the Authority determined, by considering all the elements identified in section 67(6)(b) of the Act, that the two markets for call termination were ineffectively competitive. It found that such ineffective competition led to ~~for the following reasons~~:

4.1.1 a lack of the provision of access;

4.1.2. the potential for discrimination between licensees offering similar services;

4.1.3. a lack of transparency; and

4.1.4. inefficient pricing.

4.2 Upon review of its earlier analysis of the conditions of the market, the Authority determined that the two markets remain ineffectively competitive. This is apparent from the following:

4.2.1 the relative market shares of the licensees in the defined markets ~~with the two markets being highly concentrated.~~

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

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

Table 2: Concentration Market 2: Termination le a fixed location

	2011	**2012**
Licensee 1	98%	94%
Licensee 2	2%	6%
HHI	**9664**	**8912**

4.2.1.1 Tables 1 and 2 confirm that the markets remain highly concentrated.

4.2.1.2 The market shares also indicate that Licensees 3 and 4 have been unable to significantly grow their share of termination revenue in relation to calls to a mobile

[51] ~~As per the National Numbering Plan~~

[52] Regulation 6 of the 2010 Regulations (Government Gazette 33698)

[53] See Section 2.3 on Countervailing Bargaining Power in Government Gazette 33121

location.

4.2.2 Actual and potential existence of competitors

4.2.2.1 The Authority reviewed its earlier determination that there are few, if any, opportunities for existing or new competitors to enter the market and provide an alternative product to that offered by existing licensees.

4.2.2.2 This remains the case. In particular, and as observed in the 2010 market review, there has been little growth in competitive alternatives to using call termination services, such as Voice over Internet Protocol (VoIP).

4.2.2.3 The Authority therefore finds no reason to alter its determination based on its earlier analysis.

4.2.3 Overall size of market participants

4.2.3.1 The market shares set out in Table 1 above illustrate the relative size of the market participants.

4.2.3.2 The Authority confirms, on the basis of its earlier analysis, that the relatively small size of licensees (in either the wholesale and related downstream retail market) may diminish the extent to which they can use countervailing buyer power to constrain wholesale call termination rates offered by the other licensees.

4.2.3.3 Also notable is that scale is important when attempting to compete in the mobile electronic communications market. A new entrant's total investments and total operating costs will be almost as high as existing operators, in order to compete for customers by providing national coverage, at a high quality, at reasonable prices, along with other comparable value-added services. Without scale, an operator is not able to operate efficiently because its unit costs of traffic are too high – there are few economies of scale that it can benefit from. Small licensees thus require regulatory support to obtain the necessary scale to compete effectively.

4.2.4 The degree of countervailing power in the market

4.2.4.1 The Authority reviewed its earlier determinations regarding the ability to exercise countervailing power in the wholesale call termination markets. In its earlier analysis it found that countervailing buyer power (CBP) that can be exerted by a licensee on the provider of call termination services, reduces as the size of the termination services provider increases. Larger service providers are unlikely to face CBP when they sell termination services to other buyers. However larger licensees may possess CBP over smaller licensees. However, it is unlikely that CBP from larger licensees is powerful enough to force smaller licensees to price call termination at a competitive level. In addition, no small licensees have CBP that may act as an effective constraint on wholesale call termination rates offered by large licensees in South Africa.

4.2.4.2 The Authority concludes that this earlier analysis still holds true and there is no CBP which can or which does effectively constrain call termination rates.

4.2.4.3 The Authority notes that some smaller licensees have raised concerns that the larger licensees are using indirect mechanisms, such as low on-net pricing and high off-net pricing, in order to undermine the effectiveness of the asymmetric termination rates introduced by the Authority in 2010. This sort of exercise of CBP further supports the imposition of more extensive asymmetric termination rates in order to ensure sustainable growth of small competitors (and the Authority will monitor the exercise of CBP in the period in which the Regulations apply).

4.2.5 Dynamic characteristics of the market, including growth, innovation, and products and services diversification

4.2.4.1 The Authority reviewed its earlier determination that there had been no significant product innovations or diversification that impacted on the effectiveness of competition in the wholesale call termination markets in South Africa. The same is still true.

4.2.4.2 Based on information presented to the Authority and interviews conducted with licensees, and its own research, there has been little growth in alternative technologies, such as VoIP, that could potentially constrain mobile call termination rates

4.3 The data evaluated in the course of the Authority's review demonstrates that the markets remain inadequately competitive in that they are highly concentrated; there is little growth in relation to competitive alternatives, and small licensees have not obtained the scale necessary in order to compete effectively with the larger licensees over the long term, in a sustainable way.

~~4.3~~ The Authority has found that the outcomes of these and the other market failures identified in its earlier analysis (as set out in paragraph 4.1.1 – 4.1.4 above) are still present. ~~The Authority determines that these markets remain ineffectively competitive owing to inefficient pricing.~~

5. Pro-competitive Remedies

5.1 Amongst others, the Authority imposed cost-oriented pricing on the pricing arrangements for voice call termination in the 2010 Regulations.

5.1.1. For Market 1, the Authority determined that the cost of termination in Market 1 was R 0.40 per minute.

5.1.2. For Market 2, the Authority determined that the cost of termination was R 0.19 and R 0.12 per minute dependent on the market segment in which the call is made.

5.2 On review of industry data, the Authority considers that the outcomes of the market failure identified above continue to exist. The 2010 Regulations aimed to address these outcomes and in particular to achieve the following objectives:

5.2.1 A more efficient and effective access regime

5.2.2 A more dynamic retail pricing environment and

5.2.3 Continued access and investment in electronic communications networks in SA.

5.3 The review of the market determination has established that these objectives have not yet been achieved. If the pro-competitive conditions imposed in terms of the 2010 Regulations were adequate, then the Authority would have expected to evidence of more effective competition in the relevant markets, and in particular changes to the market shares of the licensees. It would also have expected to see improvement in relation to the above objectives.

5.4 However, such improvements are not evident and therefore the Authority considers that the pro-competitive conditions previously applied are no longer proportional and need to be amended.

5.5 In relation to the regulated level of call termination rates, the Authority considers that there is inefficient pricing since the call termination rates set by the 2010 Regulations are no longer appropriately related to cost.

~~t~~5.6 The Authority recommends revised rates for Market 1 whilst determining that there is no need to change the existing rates for Market 2.

5.7 The Authority determines that the cost of termination in Market 1 is now approximately R 0.10 per minute based the industry data. ~~on amongst others, the increase in traffic on licensees' networks, where an increase in traffic reduces the cost per unit in the provision of call termination services~~. The Authority further determines that this level should be reached in three years. Therefore the proposed revised termination rates over the next three years are:

Table 3: Mobile Termination Rotes: 2014-2016

	Rand	% Decline
01 March 2013	0.40	
01 March 2014	0.20	50%
01 March 2015	0.15	25%
01 March 2016	0.10	33%

Table 4: Proposed fixed line term4nation rates: 2014-2016

	Between ON	~~Within ON~~
Fixed Termination Rate	R 0.19	~~R 0.12~~

5.8 In relation to asymmetric termination rates, t~~T~~he 2010 Regulations also imposed a limited amount of asymmetry available to licensees that met certain criteria, as outlined in Appendix B of the 2010 Regulations.

Table 5: Limitations to Asymmetry as per the 2010 Regulations

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

5.9 The qualifying criteria for an asymmetric termination rate in 2010 were:

"1.3. Licensees not listed in Regulation 7(4) (of 2010) may charge higher termination rates based on the following factors:

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

1.3.2. Economies of scale and scope based on the share of total minutes terminated in the relevant market. A licensee qualifies for an asymmetric rate if it has less than 25 per cent of total terminated minutes in the relevant market as of June 2009.[54]*"*

~~5.2 The Authority is of the view that the share of total terminated minutes should be reduced from 25 per cent of total terminated minutes to 20 per cent of total terminated minutes. This amendment is reflected in Appendix A of these~~ Draft Regulations~~.~~

~~5.2~~ 5.10 Asymmetry is a regulatory tool designed to assist small licensees to gain the scale necessary to effectively compete with larger licensees. However,

~~T~~the Authority is concerned that the markets continue to reflect ineffective competition and the market shares referred to above illustrate that small licensees have been unable to use

[54] See "Appendix B:Application of the Fair and Reasonable Obligation" of the 2010 Regulations

the asymmetry granted in 2010 to improve their ability to compete. The Authority thus considers ~~and~~ that a reduction in termination rates may not be sufficient; that asymmetrical rates are still necessary to facilitate the growth of competition in the relevant markets; but that it is necessary to provide for more extensive asymmetry for a longer period of time.

~~The introduction~~ 5.11 This extension of asymmetry is a regulatory determination taking into account a number of factors, including:

5.11.1 traffic imbalances reflecting economies of scale

5.~~9~~11.2. promotion of investment

5.~~9~~11.3. encouraging competition

5.~~9~~11.4. fostering SMMEs

5.12 Given the importance of investment in infrastructure in ensuring the achievement of sufficient scale and the differences in traffic volumes that exist in Market 1, the Authority believes it necessary to sustain and increase asymmetry for a further period of five years.

5.14 However, the Authority is of the qualifying criteria for an asymmetric termination rate should be amended so that the share of a qualifying licensee's total terminated minutes should be reduced from 25 per cent of total revenue in the market because *[ICASA to insert reason from above suggestions*]. This amendment is reflected in Appendix A of these Draft Regulations.

5.15 ~~At the end of this asymmetric period, licensees are to be charging symmetrical termination rates. However, i~~In the interests of fostering small businesses, the Authority proposes that licensees with less than ~~10~~25% of total ~~terminated minutes~~revenue in the ~~respective~~ market at the end of this five-year period may retain the asymmetric benefit of the final year provided that the Authority shall conduct a further market review at this time to determine the respective level of revenue market share of each licensee and whether or not competition is effective in the relevant market.

~~table below outlines the asymmetric glide-path of termination rates available to those licensees that meet the qualification criteria:~~

~~*Table 6: Maximum asymmetric termination rote which a qualifying licensee may charge for termination in Market 1*~~

	~~Maximum Rate~~
~~01 March 2014~~	~~R 0.39~~
~~01 March 2015~~	~~R 0.33~~
~~01 March 2016~~	~~R 0.26~~
~~01 March 2017~~	~~R 0.20~~
~~01 March 2018~~	~~R 0.14~~
~~01 March 2019~~	~~R 0.20~~

~~*Table 7: Maximum asymmetric termination rate which a qualifying licensee may charge for termination in Market 2*~~

	~~Between ON~~	~~Within ON~~
~~01 March 2014~~	~~10%~~	~~10%~~
~~01 March 2015~~	~~10%~~	~~10%~~
~~01 March 2016~~	~~10%~~	~~10%~~
~~01 March 2017~~	~~10%~~	~~10%~~
~~01 March 2018~~	~~10%~~	~~10%~~
~~01 March 2019~~	~~10%~~	~~10%~~

Annexure E
Cell C's previous written submission to ICASA on 2 August 2013

CONFIDENTIAL

Annexure F
Cell C's previous written submission to ICASA on 11 September 2013
CONFIDENTIAL