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Redacted Version

The Chairperson

Independent Communications Authority of South Africa

Licensing Department

Block B, 350 Witch-Hazel Avenue

Eco Point Office Park,

Centurion

Per Email: CTR2021@icasa.org.za

Dear Sir,

Draft Amendment to the Call Termination Regulations, 2014

1. We refer to the Draft Amendment to the Call Termination Regulations, 2014, published in Government Gazette No. 50325 dated 22 March 2024 (**Draft Regulations**).
2. Cell C welcomes the opportunity to make written representations to the Independent Communications Authority of South Africa (**Authority**) on the Draft Regulations.
3. Cell C's submission is structured as follows:
 - 3.1. Background;
 - 3.2. The Draft Regulations;
 - 3.3. Symmetry;
 - 3.4. The need for continued asymmetry for smaller operators such as Cell C;
 - 3.5. The proposal for a one-year glide path and methodology utilised by the Authority;
 - 3.6. Qualifying criteria and sunset clause;
 - 3.7. Motivation for asymmetry for the next regulatory term;
 - 3.8. Price relation of new entrants;
 - 3.9. Cell C's proposal; and
 - 3.10. Conclusion.
4. Attached to this submission are the following annexures:

- 4.1. **Annexure A** – Letter submission on the CTR Commentary - Mobile Cost Model, dated 15 January 2024;
- 4.2. **Annexure B** – Cell C Letter Call Termination Review Methodology dates 21 July 2024;
- 4.3. **Annexure C**- Cell C Financial Impact of the draft CTR Regulations
- 4.4. **Annexure D** - ICASA FORM - Request for Confidentiality in terms of section 4D of ICASA Act into Cell C Response to CTR Review. Cell C requests confidentiality for the identified information in terms of section 4D of the ICASA Amendment Act, No. 2 of 2014, due to the commercially sensitive nature of the information, which may cause harm to the commercial or financial interests of Cell C, if disclosed to the public and third parties.

A. Background

5. On 28 May 2021, the Authority published a notice of its intention to review the pro-competitive conditions imposed on certain licensees in terms of the Call Termination Regulations, 2014 (**Regulations**).¹
6. The aforementioned review process was undertaken in the following phases:
 - 6.1. Phase 1: Commencement of the Review and Request for Information.²
 - 6.2. Phase 2: Discussion Document,³ wherein the Authority set out its preliminary views with regard to the review of the 2014 pro-competitive conditions.
 - 6.3. Phase 3: Public hearings on the Discussion Document.⁴
 - 6.4. Phase 4: Findings Document.⁵ On 28 March 2022 the Authority published the 'Findings Document on the Review of the 2014 Pro-competitive Remedies imposed on Licensees in terms of the Call Termination Regulations, 2014' (**2022 Findings Document**).
 - 6.4.1. The Authority's findings were as follows⁶:
 - 6.4.1.1. Neither retail nor wholesale constraints are likely to be effective in preventing a wholesale voice call termination services provider from setting termination rates above competitive levels in absence of regulatory intervention.

¹ Government Gazette No. 44636.

² Phase 1 was concluded on 31 August 2021.

³ Government Gazette No. 45426 of 5 November 2021.

⁴ Which took place in February 2022.

⁵ Government Gazette No. 46107 of 28 March 2022.

⁶ Paragraph 3 of the 2022 Findings Document.

- 6.4.1.2. The relevant markets are mobile termination markets and fixed termination markets (including termination of voice calls originating outside of South Africa).
 - 6.4.1.3. Each individual licensee that offers wholesale voice call termination services in South Africa has 100% share of the market in respect of voice calls terminating on its network and has Significant Market Power.
 - 6.4.1.4. The four market failures identified in 2014 will manifest in the absence of regulation of the relevant markets.
 - 6.4.1.5. Cost-based pricing (including asymmetry) and Reference Interconnection Offer remedies are necessary in order to address market failures in the relevant markets.
- 6.4.2. The Authority made, *inter alia*, the following determinations with respect to the pro-competitive terms and conditions:⁷
- 6.4.2.1. Mobile termination rates will move to symmetry within a transitional period of 12 months.
 - 6.4.2.2. New licensees will qualify for asymmetry for a limited period of 3 years after entry into the market.
 - 6.4.2.3. South African licenses must charge reciprocal international termination rates for voice calls originating outside of South Africa.
7. The publication of the Findings Document concluded the review phase (referred to as the 'Market Review Phase').
8. On 26 May 2023 the Authority published a notice to commence with the Cost Modelling Phase in order to determine the efficient cost of providing wholesale voice call termination services.⁸ The Cost Modelling Phase consists of 3 steps, namely:
- 8.1. Step 1: Request for Information and Meetings.
 - 8.2. Step 2: Publication of Draft Regulations, the content of which will be informed by the information submitted by stakeholders during Step 1 mentioned above, and the cost modelling exercise conducted by the Authority.
 - 8.3. Step 3: Final Regulations.

B. The Draft CTR Regulations

9. On 22 March 2024 the Authority published the Draft Regulations, which seeks to amend the Regulations, in terms of section 4(3)(j) of the Independent Communications

⁷ Paragraph 5.1.5 of the 2022 Findings Document.

⁸ Government Gazette No. 48660 of 26 May 2023.

Authority of South Africa Act, 2000, read with sections 4(1) and 67(8) of the Electronic Communications Act, 2005 (ECA).

10. The Draft Regulations seek to introduce, *inter alia*, the following amendments to the Regulations:

10.1. New Entrants (defined to mean ‘a licensee who has been in the market for a period of less than three years’) will qualify for asymmetry for a limited period of 3 years after entry into the market.⁹

Maximum call termination rate for New Entrants	Termination rate to a mobile location	Termination rate to a fixed location
1 July 2024	R0.07	R0.04

10.2. Licensees referred to in sub-regulation (4) (i.e., MTN (Pty) Ltd (**MTN**) and Vodacom (Pty) Ltd (**Vodacom**) in relation to mobile termination markets, and Telkom SA SOC Limited (**Telkom**) in relation to fixed termination markets) must charge the following wholesale voice call termination rates to a mobile or fixed location:

Maximum call termination rate for Large Mobile Operators	Termination rate to a mobile location	Termination rate to a fixed location
1 July 2024 to 30 June 2025	R0.07	R0.04
1 July 2025	R0.04	R0.01

10.3. In order to address the market failures (as set out in the Draft Regulations¹⁰), an ECNS and ECS licensee must charge fair and reasonable prices for wholesale voice call termination consistent with Annexure A to the Draft Regulations.¹¹ In relation to mobile termination markets, Annexure A provides that:

10.3.1. “Fair and reasonable prices” are rates that are equivalent to the cost-based rates imposed on the licensees identified in regulation 7(4) (i.e., MTN and Vodacom).

10.3.2. In relation to mobile termination markets, licensees must charge reciprocal rates with the rate set for MTN and Vodacom if these licensees offer termination to a mobile location within South Africa.

⁹ Regulation 7(5)(b)(iii).

¹⁰ Being, (a) a lack of provision of access; (b) the potential for discrimination between licensees offering similar services; (c) a lack of transparency; and (d) inefficient pricing.

¹¹ Regulation 7(2).

- 10.3.3. A licensee not listed in regulation 7(4) (i.e., aside from MTN and Vodacom) may charge higher rates if the licensee has a share of total minutes terminated in the wholesale voice call termination markets of 20% or less of total minutes terminated to a mobile location as at 31 December 2023 (Small Operators).
- 10.3.4. The licensees mentioned in paragraph 10.3.3 (i.e., Small Operators) must charge a rate in the following terms in relation to termination to a mobile location:
 - 10.3.4.1. a termination rate of R0.09 for the period 1 July 2024- 30 June 2025; and
 - 10.3.4.2. a termination rate of R0.04 from 1 July 2025.
- 10.4. In effect, the Draft Regulations impose a 1-year glide path to symmetry, after which Small Operators must reduce their terminate rate by R0.05, compared to MTN and Vodacom who must reduce their termination rates by R0.03.
- 10.5. Licensees who contravene regulation 7(2) (i.e., licensees who fail to charge “fair and reasonable prices” for wholesale voice call termination consistent with Annexure A) are liable to a fine of R500 000.00.
- 10.6. Accordingly, Small Operators who fail to charge symmetrical rates from 1 July 2025 are liable to a fine of R500 000.00.
11. The Draft Regulations, once finalised, will come into effect on 1 July 2024.

C. Symmetry

12. At the outset, and before dealing with Cell C’s specific comments on the Draft Regulations, Cell C reiterates that it does not (at least, not at this stage) support a move towards symmetry. Asymmetry remains necessary for smaller players to pose even a slight competitive constraint on bigger players in the market.
13. Cell C submits that there is clear evidence that the factors which led to the Authority’s introduction of asymmetry persist, and that a premature move to symmetry could lead to a substantial prevention or lessening of competition in the market and undermine investment and consumer welfare.
14. Cell C notes that in the 2022 Findings Document, the Authority justified the move towards symmetry on the following basis:
 - 14.1. Indefinite asymmetry could disincentivise smaller and late entrants to become inefficient operators, and is not in line with international best practice where asymmetry is provided to new entrants for a limited period of 3 to 4 years upon entry (the Authority has repeatedly referred in this regard to the European Commission’s (EC) principle for asymmetric termination).

- 14.2. According to the Authority’s reasoning, the rationale for a limited period of asymmetry is “*to achieve a balance between recognising cost differences between small and large operators, and perpetuating cost inefficiencies amongst small later entrants*”.¹²
- 14.3. Negative externalities faced by smaller operators have been reduced since the Authority’s decision in 2014 to use the long-run incremental-plus cost standard to calculate the efficient cost of providing fixed and mobile termination services.
- 14.4. Accordingly, according to the Authority, granting an additional 3-year period of asymmetry will:
- 14.4.1. not be in line with international best practice;
 - 14.4.2. could potentially distort competition, and have a concomitant negative impact on consumer welfare; and
 - 14.4.3. could impact customers “*as the originating licensee will presumably increase retail off-net prices by a premium equivalent to the asymmetric paid to the smaller operator, and, thus, generate allocative and productive inefficiencies*”.¹³
15. The Authority relies heavily on ‘international best practice’ in justifying a limited period of asymmetry, more specifically the EC’s principle for asymmetric termination. Whilst Cell C does not dispute that such precedent cautions that indefinite asymmetry could disincentivise smaller and late entrants to become inefficient operators, the EC’s principles (or any other international precedent) cannot be indiscriminately applied without sufficient justification and careful consideration of its appropriateness and relevance to the South African market. The Authority ought not disregard the argument that asymmetry can also enable smaller firms to expand in the market and strengthen competition in the long run, which naturally will result in an increase in dynamic efficiency.
- 15.1. Professor Nicola Theron and Laurie Binge argue that “*a regulator may trade off short term inefficiency for longer term dynamic efficiency. Whether this trade-off is appropriate depends on the circumstances of each country. The less competitive the market the stronger the case for asymmetry, as the competitive gains will be more substantial and the short-term inefficiencies relatively less significant. Therefore, the benefits of promoting long run competition may be larger in relatively concentrated retail markets, as is the case in South Africa.*”¹⁴ (emphasis added)
- 15.2. Cell C submits that the South African market remains highly concentrated and lacks effective competition. The Regulations, and particularly asymmetry, remain vital to rebalancing the distortions in the market. In Cell C’s view, the long-term competitive

¹² 2022 Findings Document, paragraph 4.7.10.2.

¹³ *Ibid.*

¹⁴ Prof N Theron, L Binge, “The Interface between Competition and Sector-Specific Regulation in the Telecommunications Industry: The Case of Mobile Termination Rates”, paragraph 4.1.4.

gains and dynamic efficiencies arising from asymmetry will outweigh any short-term inefficiencies which the Authority appears to be guarding against.

- 15.3. Without derogating from the aforementioned argument, Cell C disagrees with the rationale provided by the Authority in motivating for a limited period of asymmetry, namely “to achieve a balance between recognising cost differences between small and large operators, and **perpetuating cost inefficiencies amongst small later entrants**”.¹⁵ (emphasis added)
- 15.4. Asymmetry has not perpetuated any cost inefficiencies *vis-à-vis* Cell C, nor will it do so should asymmetry remain in place. Since the commencement of asymmetry, Cell C has undertaken numerous initiatives to enhance its cost efficiency and provide competitive offers to its consumers. Cell C’s efficiencies in this regard are evident in their past and ongoing efforts to leverage network technology, minimise network costs, streamline and downsize operations, and transition its network. In relation to Cell C’s efforts to continuously provide competitive offerings to consumers, the following examples bear mention:
- 15.4.1. Cell C’s offering ‘Talk All Day!’ is a promotional one-day bundle which enables prepaid Cell C customers to enjoy a day of unlimited calls to Cell C numbers for the low price of R9 per day;
- 15.4.2. The product suite of ‘Hot Deals’, offers all new Cell C customers voice bundles at very competitive pricing; and
- 15.4.3. Cell C’s flagship ‘4Eva tariff plan’ offers Cell C customers, *inter alia*, favourable terms in relation to the non-expiry of bundles, and ANAT minute for R0.45.

D. Need for continued asymmetry for smaller operators such as Cell C

16. The Authority has not provided any evidence that asymmetrical termination rates are no longer required to support the development of effective competition. Rather, it is clear that South African market conditions do not warrant symmetry at this stage. In this regard, the Authority has failed to have regard to the following factors which clearly do not support a move to symmetry:
- 16.1. Asymmetry in respect of network costs persists between large and small operators. As will be shown below, the Authority’s own model indicates a **high degree of cost asymmetry between small-scale and large-scale operators**, meaning that price-based symmetry remains an important aspect of the Southern African market to reflect the entrenched cost-based asymmetry between small-scale and large-scale operators. Cell C reiterates that the scale (and also coverage-related) disadvantages faced by Cell C in the South African market are sufficiently large that the differences in underlying unit costs are material, and not marginal, and these disadvantages affect both Cell C’s voice and data network costs. This affects Cell C’s ability to drive competitive pressure against its much-larger competitors.
- 16.2. Notwithstanding the Authority’s decision in 2014 to use the long-run incremental-plus cost standard to calculate the efficient cost of providing fixed and mobile termination

¹⁵ 2022 Findings Document, paragraph 4.7.10.2.

services, smaller players continue to face negative market externalities sufficient enough to warrant the Authority to maintain asymmetrical termination rates for Small Operators beyond the one-year glide path proposed by the Authority.

16.3. The market remains dominated by two large players. A lack of effective competition between small and large operators has resulted in the inability on the part of smaller players, such as Cell C, to effectively target call volumes, customer groups or segments of the market which are entrenched within the large operators. Vodacom and MTN remain by far the two well-established operators with significant market shares (consistently in excess of 70% of subscribers combined, as can be seen in Figure 1 below). The other two operators, Cell C (third entrant) and Telkom Mobile (fourth entrant), have been in the market for more than a decade, yet remain unable to achieve the scale of the incumbents due to continuing market failures (and despite continued efforts to provide competitive offerings and enhance cost efficiencies).

16.3.1. Cell C wishes to emphasize that, although not intended, the two previous regulatory cycles enabled an over-recovery of costs by large operators and an under-recovery by small operators, which should be avoided in the next regulatory cycle, and in future reviews.

16.3.2. Due to the entrenched duopoly of the two mobile incumbents in South Africa (now 27 years) in an environment without any (effective) ex-ante intervention to limit their dominance in the retail market, and the over-recovery of actual, and efficiently-incurred costs in the regulated call termination market, Cell C has not yet been able to attain even a 20% market share of terminated minutes, despite its best efforts to compete over the last 15 years since its own market entry.

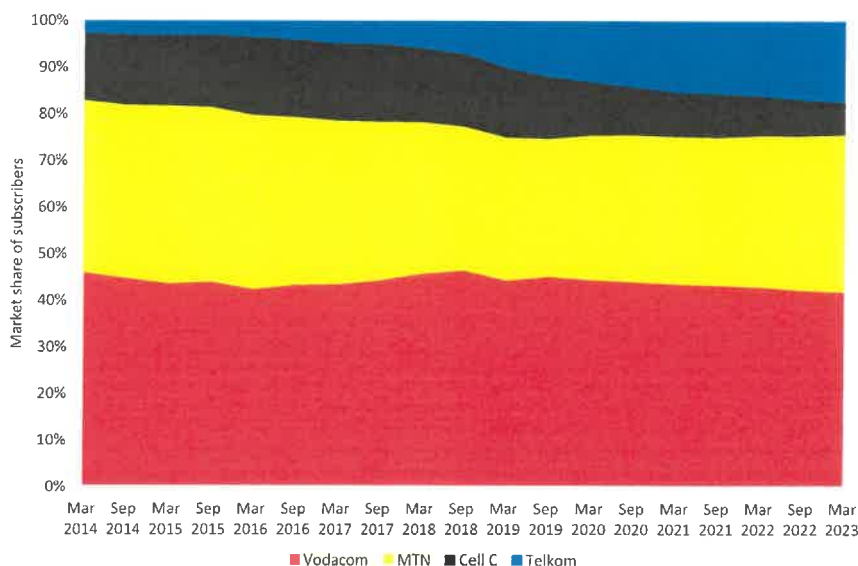


Figure 1: Market share of subscribers by operator in South Africa, 2014 to present¹⁶

¹⁶ This excludes wholesale subscribers. Whilst Telkom's market share has increased, it remains significantly smaller than Vodacom and MTN. Telkom's growth has likely been supported through the benefits of scale

- 16.4. The Authority has stated that economies of scale “may” be relevant to the assessment of appropriate pro-competitive remedies.¹⁷ Cell C submits that economies of scale should be directly relevant to the Authority’s assessment of what pro-competitive remedies are appropriate, including whether and for how long asymmetry should persist. This is supported by the European Regulators Group who have argued that scale advantages (together with spectrum and network disadvantages) is relevant to the assessment on whether asymmetry is justifiable.¹⁸
- 16.5. The Authority’s reliance on the argument that an additional 3-year period of asymmetry will impact customers because “*the originating licensee will presumably increase retail off-net prices by a premium equivalent to the asymmetric paid to the smaller operator, and, thus, generate allocative and productive inefficiencies*” is misplaced, and without adequate justification or proof. Moreover, the Authority fails to take into account alternative remedies such as regulating retail off-net prices (or differentials between on-net and off-net prices) or leaving any potential abuse by dominant firms to be adjudicated by the Competition Commission. This perceived concern by the Authority does not alone justify a move towards symmetry.
17. Allied to the above, if the Authority’s ultimate goal *vis-à-vis* the regulation of call termination rates is that a reduction in call termination rates will translate into lower prices to consumers, the Authority ought to carefully scrutinise and consider the regulation of retail prices, or any other alternatives, instead of imposing symmetrical rates which may lead to an increase in prices to consumers (as dealt with more fully below).
18. For the reasons set out above, Cell C submits that the Draft Regulations do not adequately deal with the harm that would eventuate if asymmetry was to be abolished on the terms and within the timeframe contemplated in the Draft Regulations.
19. As will be shown below, the Authority’s proposal to drastically decrease termination rates without maintaining asymmetry would disproportionately benefit the already dominant players, lead to revenue loss for Smaller Operators such as Cell C, and will have no direct benefit to the end consumer. This proposal not only threatens the sustainability of smaller players in the market, but also undermines the Authority’s mandate to promote healthy competition in the market.

E. The proposal for a one-year glide path and methodology utilised by the Authority

One year glide path

20. Without derogating from the above, even if Cell C considered a move towards symmetry as appropriate and justifiable at this stage (which it does not), a one-year glide path is not rational, nor is the cost model utilised by the Authority.

and scope gained from its dominant incumbent’s fixed business. These benefits include: extensive use of its fixed infrastructure in its mobile network deployment; and common/overhead cost synergies.

¹⁷ 2022 Findings Document, paragraph 4.5.4.3.

¹⁸ European Regulators Group. 2008. “ERG’s Common Position on symmetry of fixed call termination rates and symmetry of mobile call termination rates.” ERG (07) 83 final 080312.

21. Should the Authority persist with a transition to symmetry, such a transition needs to take place over a reasonable period, at reasonable reductions in rates (calculated according to an appropriate and reliable cost model), so as to avoid revenue shock and market disruption and ensure the long-term sustainability of the market.
22. Cell C notes with concern that the Draft Regulations propose that Small Operators suffer larger reductions in termination rates compared to large operators. In this regard, the Draft Regulations will require Small Operators to **drastically** decrease termination rates from the current R0.13 to R0.04 in a mere 12 months starting in July 2025.
23. Not only will such large reductions in rates over such a short period cause severe financial harm implications for smaller players, but the symmetric rate arrived at by the Authority is based on a flawed cost model which is based on the pure long-run incremental costs (**pure LRIC**) of a large operator, which will have wide-ranging detrimental consequences to smaller players, the competitiveness of the market and consumers.

24. [REDACTED]

25. In this regard, Cell C consider these losses to be drastic on the business, and unreasonable for competition due to anticipation of this decision strengthening the duopoly and the dominance of the licensees with significant market power identified in the draft regulation.

26. Cell C consider that the Authority must effect regulatory interventions guided by section 67 (4) of the ECA in considering pro-competitive remedies to the persistent ineffective competition in the market.

27. [REDACTED]

F. The Authority's proposed interconnection rates are flawed and skewed in favour of Big Operators

28. The Authority has not properly evaluated and applied the information before it in order to reach a final decision regarding its election and utilisation of its cost model, and risks being susceptible to review.
29. Cell C has consistently raised concerns with the Authority's decision of modelling and applying only the pure LRIC method (compared to the pro-competitive regime of asymmetry and total long-run average incremental costs (**LRAIC+**) which has been in place for many years, and which has resulted in steadily declining costs and a

meaningful amount of asymmetry in termination rates). In this regard, Cell C has highlighted, *inter alia*, that:¹⁹

- 29.1. The Authority's justification for its preference for pure LRIC based on its use in other markets (like those in Europe) as a pro-competitive remedy is misplaced and fundamentally flawed given that the aforementioned markets (particularly in EU Member States) are much more effectively competitive compared to the South African market.
- 29.2. A bottom-up cost model should ensure that the Authority gains a robust understanding of mobile network costs in South Africa, including:
 - 29.2.1. the drivers of unit costs of traffic, particularly voice termination;
 - 29.2.2. the relative contributions of different assets to the cost stack, given that there are different costing methods of relevance, such as:
 - 29.2.3. pure LRIC (the Authority's chosen model);
 - 29.2.4. LRAIC+ (which represents all network-related costs faced by operators and the approach previously implemented by the Authority);
 - 29.2.5. the manner in which scale and other structural aspects facing smaller players in the South African market influence the unit costs of smaller players compared to bigger players; and
 - 29.2.6. considerations of efficiency and 'generic' scale, distinct from actual scale.
- 29.3. Separate modelling of different operator scales is crucial to the Authority's understanding of the costs of mobile termination services in South Africa. Modelling of LRAIC+ and LRAIC results (i.e., total costs including and excluding an allowance for non-network overhead costs) is fundamental to understanding network costs at different scale, account for the substantial common network costs of mobile networks (arising from the need for network coverage irrespective of demand volumes).
30. As recently as January 2024, Cell C highlighted to the Authority that its fifth (and near final) version of its cost model, despite its numerous iterations, continued to have significant shortcomings regarding its reliability and applicability for termination pricing.
 - 30.1. Fundamentally, the Authority's modelling approach does not grasp the intricacies of pure LRIC and the need for more careful considerations when compared with LRAIC+.
 - 30.2. Cell C demonstrated the unreasonable and illogical behaviour of pure incremental cost calculations, compared to the more reasonable and reliable behaviour of a LRAIC+ result, which Cell C tested in the Authority's fifth (and near final) model. In this regard, Cell C found that if the Authority utilised the application of its (then fifth version) of its model for pricing, then its model would demonstrate that operators with a lower market share have significantly higher costs for termination (both average costs and avoidable costs) than operators with a higher market share. This would mean that:

¹⁹ See Cell C's letter to the Authority dated 6 October 2023 and 15 January 2024.

- 30.2.1. setting symmetric prices using the pure LRIC of a large operator would allow avoidable cost recovery for large operators but not for small operators; and
 - 30.2.2. setting symmetric prices using the pure LRIC of a small operator would facilitate significant over-recovery of avoidable costs for large operators since the small operator pure LRIC is greater than the large operator LRAIC+ (i.e., small operators would effectively be subsidising large operators).
31. On either construct set out in paragraph 30.2.1 and 30.2.2, the Authority's model is flawed and will result in severe detrimental consequences to smaller operators.
 32. Notwithstanding the above, the Authority rejected LRAIC+ in favour of pure LRIC for its cost modelling and price-setting and has based its proposed termination rates on the pure LRIC of larger players in the market. This means that the Authority's model allows avoidable cost recovery for large operators but not for small operators. This will have extremely detrimental, if not fatal, consequences to smaller players, the competitiveness of the market and consumers as:
 - 32.1. Smaller players (who already have had to significantly reduce their termination rates over a 2-year period in a market where the legacy size discrepancy between market participants have never been properly addressed) will not be able to absorb reductions in revenue arising from the under-recovery of avoidable costs;
 33. To remain in the market, smaller players will likely have to increase their prices to consumers, which completely undermines the purpose for the Authority's intervention in the market, and the significant progress which has been made since the inception of the Regulations in promoting competition and reducing prices to consumers;
 - 33.1. An increase in prices on the part of smaller players will likely result in customer migration, particularly in circumstances where larger players have, and will continue to utilise, on-net calling advantages which smaller players are simply unable to replicate; and
 - 33.2. Consequently, the dominance of the Big Operators will only be further entrenched, increasing the risk of harm which is perceived to result from the conduct of dominant firms- both in terms of exclusionary effects on small players as well as the detriment to consumers (such as, *inter alia*, the lack of choice given the inevitable exit of smaller firms from the market). Effectively, the Draft Regulations might be perceived by the Big Operators as a license to further foreclose on the smaller operators in a market where they already have significant advantages of scale.
 34. The Authority's entire model, which has informed the formulation of the reciprocal call termination rate to be charged from 1 July 2025, is thus flawed and for that reason alone, the Draft Regulations ought to be revised.
 35. Without careful consideration *vis-à-vis* a sufficient glide path and the utilisation of appropriate and reliable cost methodology in transitioning towards symmetry, there is a risk that the Draft Regulations could completely undermine what the Authority sought to achieve at the inception of the Regulations (namely, to achieve a more efficient and effective access regime; a more dynamic retail pricing environment; and continued access and investment in electronic communications networks).

G. Qualifying criteria

36. The Authority states in Draft Regulation 7(3)(a) that the qualifying criteria for asymmetry will be the licensee's share of the terminating minutes market being below 20%.
37. Cell C support the provision of in the regulation which aligns with the objects of the policy in rebalancing the market structure, and in particular a basis for the authority to impose regulatory remedies.
38. The elements of this criteria sets out the framework for the authority to intervene in the market, and impose asymmetrical call termination rates.

H. Price regulation of new entrants

39. It would be helpful if the Authority could provide clarity in relation to the inclusion of 'new entrants' in the Draft Regulations and the proposal that new entrants will qualify for asymmetry for a limited period of three years after entry into the market.
40. In particular, Cell C requests clarification on the determination of the level of asymmetry which will be afforded to 'new entrants', particularly since on the construct of the Draft Regulations, operators which enter the market at a later stage will be afforded termination rates based on cost models prepared some years earlier, given that the "new" operator will not have information with which to prepare a top-down model.
41. Cell C submits that the Authority should use top-down and bottom-up Pure LRIC models to determine the **actual cost** difference between operators in both markets with asymmetry levels set based on a hypothetically efficient operator (emphasis added). As pointed out above, a new operator will not have any information with which to prepare a top-down model, and as such it is not clear how this will be possible.
 - 41.1. In relation to the aforementioned quote, it is unclear whether emphasis will be placed on any particular cost incurred by operators engaged in such efforts. In addition, this approach is unlikely to "compensate" for the competitive disadvantages that the small/late operators have faced and the advantages that incumbent operators have had for a lengthy period of time.
 - 41.2. Furthermore, asymmetry based on an operator's own costs (reflecting their smaller scale) will only go as far as to compensate for the actual costs in the call termination market and will not provide any additional compensation for potential financial imbalances from efforts to gain market share. For example, smaller operators will face higher unit costs for data services as well as voice (call termination) services, yet smaller operators will be unable to sell mobile data services for a higher retail price than their larger-scale competitors.
 - 41.3. Financial imbalances from small scale arise in all markets, not just call termination, and Cell C submits that the Authority's asymmetry proposal will not address other markets – Cell C continues to argue that above-cost regulation for small operators, and at-cost regulation for large operators, is a proportionate approach to support market share re-balancing.

I. Cell C's proposal for asymmetry

42. Cell C does submit that the decision to move to symmetry within 12 months of skewed asymmetry call termination rates harm smaller licensees with less than 20 percent market share of the market, and the proposed intervention in section 7 of the draft regulation will not adequately address the market failures identified by the Authority in the draft regulation.
43. Cell C argue that the pro-competitive terms and conditions must resemble similar intervention which reasonable enough to address the market failures identified. Cell C further believes that the Authority has sufficient room to impose competitive terms and conditions including a longer period of asymmetry call termination rates given the current 13c and 9c ratio. In addition, the Authority should provide for transitional period that is reasonable in order to minimise disruption in the market particularly protect smaller operators. Whilst progress has been made by small players in the market as a result of previous iterations of the Regulations, this progress has been marginal, and at a rate that warrants the transitional period to be extended.

Determining a sustainable period and rate of asymmetry which gradually decreases

44. The draft regulation, section (7) has made fundamental market failures which the authority believes will recur, including the following:
- A lack of provision of access,
 - The potential for discrimination between licensees offering similar services,
 - A lack of transparency, and
 - Inefficient pricing.
45. Taking the above findings into account, Cell C reiterates that affording smaller operators and new entrants asymmetry should not be tied to a defined-time period, but rather to the level of scale of the operator. This is more equitable approach and in line with the ECA. Cell C submits that for the future regulatory reviews, the Authority should apply cost modelling, taking into account scale, in addition to the position where cost differences still persist in order to determine the level of asymmetry.
46. In addition to the above, given the extent to which the large operators are able to retain and grow their on-net traffic, which is also evident in the growth of their subscriber bases and traffic volumes, in addition to: (i) acknowledging the need for asymmetric rates for small operators that are not only reflective of their costs; and (ii) affording those operators an opportunity to achieve reasonable scale without a cut-off date, it will be critical to consider the likelihood that the on-net traffic of large operators will continue to increase, to the detriment of small operators, and take action to limit the on-net off-net disparity in pricing by large operators, as well as their ability to pay enhanced asymmetric termination rates to small operators.
47. A margin squeeze test for (low) on-net pricing relative to mobile termination rates would reveal the extent to which an off-net operator (i.e. Cell C) is prevented from offering calls to Vodacom or MTN subscribers on a comparable basis to the operator itself.
48. Cell C has lower EBITDA margins since the introduction of the Call Termination Regulation, and this is relative to the lower prices that Cell C has introduced in the

market over the years. We wish to draw the Authority's attention to the Competition Commission's Data Services Market Inquiry Report, 2019 where the market behaviour of larger MNOs was observed, wherein this reaction is similar in the voice call market, see below:

"On headline data prices, Cell C has historically been more aggressive and yet the two larger networks have found it profitable to not follow their pricing downwards. As a result, it seems that Cell C has recently determined that it cannot win sufficient share by lowering prices and has proceeded to raise them back upwards. More recently, it has been the turn of Telkom Mobile to be more aggressive on pricing, dropping headline rates well below its rivals. However, the larger networks, especially Vodacom, have not sought to respond with lower headline prices themselves."

"The resilience of the dominant positions lends credence to the submissions which suggest certain market features serve to perpetuate the first mover advantages of Vodacom and MTN, and that the failure to regulate these in the past has contributed to this dynamic".

J. Cell C's proposed glide path and asymmetric termination rates

49. Cell C maintains the view that pro-competitive regulation, which includes the maintenance of longer asymmetry is crucial for addressing the ineffective competitiveness in the market, including those highlighted by the Competition Commission stated above. We emphasize that asymmetrical termination rates will ensure that:
 - a) smaller MNOs promote competition,
 - b) address the potential for discrimination between licensees offering similar services;
 - c) price transparency and stimulate industry growth;
 - d) reducing retail prices and improving offerings to consumers.
50. Therefore, Cell C calls upon the Authority to reconsider its approach and extend asymmetry through the implementation of a more reasonable and sustainable glide-path. Such an approach would be in line with the outcomes of the Authority's own modelling exercise and the findings resulting therefrom (as set out above) and would be in line with section 67 of the ECA. This will not only safeguard the harm suffered by Smaller Operators but also uphold the principles of fair competition, which will be to the benefit of consumers and the industry as a whole.
51. Cell C's proposal below ensures that competition is enhanced in line with the objectives of the ECA, whilst ensuring that termination rates continue to decrease (in a sustainable manner). In this regard, Cell C proposes a reasonable glide path which ensures asymmetrical termination rates on a more equitable and sustainable basis in line with Figure 2 below.

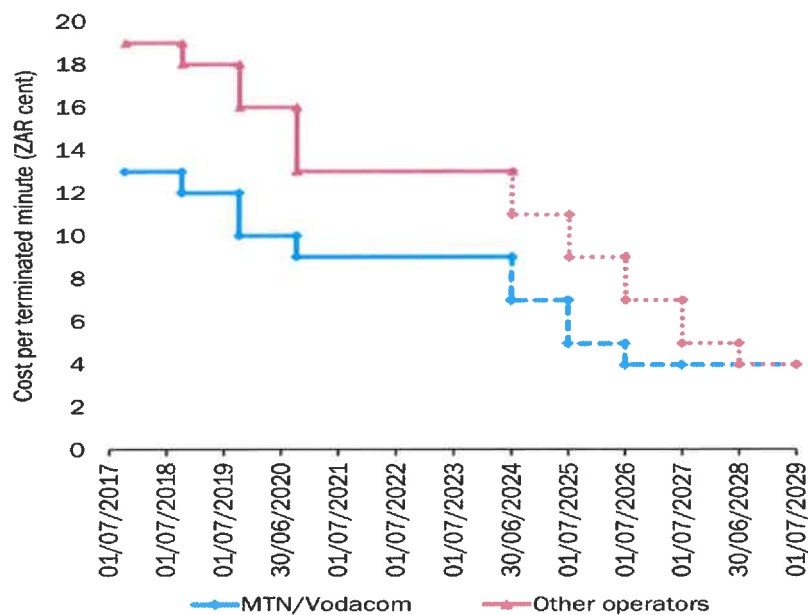


Figure 2

K. International Termination Rates regulation

- Cell C notes, with interest understand that the international termination rates are based on the reciprocity principles as discussed in section 4 (b)(ii) of the draft regulations. The provisions of in this regulation also states as follows:

“A licensee identified in sub-regulation (4) must charge reciprocal international termination rates for voice calls originating outside of South Africa. The International termination rates charged by a licensee must not be: (a) less than the domestic regulated termination rates; or (b) higher than the international termination rates offered by an international operator.”

L. Conclusion

52. For the reasons set out above, Cell C respectfully submits the Authority consider the submission in the interest of promoting competition and fulfil its role sufficiently as enjoined by section 67 of the Electronic Communications Act, and fully address the market failures through regulations that addresses the market imbalances due to late entrant of Cell C and Telkom in the Mobile Market.
53. Cell C submit that the Draft Regulations (in its current form) should not come into effect on 1 July 2024, and further propose the regulations to follow the normal cycle of the effective date of 01 October.
54. The (detrimental) consequences which are likely to ensue as a result of the Draft Regulations as highlighted throughout this submission warrant further consideration so as to not undermine the object of the ECA to, *inter alia*, “*promote competition within the ICT sector*”²⁰ and the purpose of the Authority’s *ex ante* regulatory powers which are crucial to address the structural concerns persisting in the market, and particularly the current entrenched market power.
55. Cell C looks forward to engaging further with the Authority on the content of this submission.

Yours faithfully



Themba Phiri
Managing Executive: Regulatory and Policy Affairs

²⁰ Section 2(f) of the ECA.