

**MTN'S SUBMISSION TO THE DRAFT END-USER AND SUBSCRIBER SERVICE CHARTER
AMENDMENT REGULATIONS, 2024 PUBLISHED BY THE INDEPENDENT
COMMUNICATIONS AUTHORITY OF SOUTH AFRICA IN GOVERNMENT GAZETTE NO.
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1. INTRODUCTION AND GENERAL REMARKS

- 1.1 On 29 February 2024, the Independent Communications Authority of South Africa (the “Authority”) published the Draft End-User and Subscriber Service Charter Amendment Regulations, 2024 (“Proposed Amendments”) and an Explanatory Memorandum to the Proposed Amendments (“Explanatory Memorandum”).
- 1.2 The Explanatory Memorandum sets out that the Proposed Amendments are a continuation of the process which commenced in 2022 to amend the End-User and Subscriber Service Charter Regulations, 2016 (“the Charter”). During the 2022 process, the Authority proposed, *inter alia*, a 6-month expiry rule for data, and unlimited data bundle transfers.
- 1.3 After an extensive consultation process, the Authority published its amendments in the End-User and Subscriber Service Charter Amendment Regulations, 2023 on 28 March 2023 and reserved its decision in respect of the 6-month expiry rule, and unlimited data transfers for further consultation.
- 1.4 Mobile Telephone Networks (Pty) Ltd (“MTN”) thanks the Authority for the opportunity to engage further in respect of these Proposed Amendments to the Charter.
- 1.5 MTN is committed to ensuring that end-users are afforded the best quality of service and customer experience in respect of electronic communications services. MTN submits that given the relatively small size of the South African market compared with its peers¹, providers of retail

¹ Roughly 60 million people in South Africa, with an unemployment rate of 41.1% (44.3% amongst youth), Stats SA [chrome-extension://efaidnbmnnnibpcajpcgiclfndmkaj/https://www.statssa.gov.za/publications/P0211/Media%20release%20QLFS%20Q4%202023.pdf](https://www.statssa.gov.za/publications/P0211/Media%20release%20QLFS%20Q4%202023.pdf)

While in of 2022 reports show, Brazil with a population of 215.3 million people and an unemployment rate of under 10%, Russia’s population as 144.2 million and an unemployment rate of around 5.1%, China’s population

electronic communications services are highly incentivised to provide products and services which are attractive to end-users to compete effectively and remain relevant in our competitive, dynamic industry.

- 1.6 MTN recognises that electronic communications services are vital to the daily activities of end-users, the stability and growth of the South African economy, including the digital economy, and continued functioning of critical infrastructure of the country.
- 1.7 The importance of electronic communications services was highlighted in the last few weeks by the undersea cable breakages which lead to digital loadshedding across the country. These undersea cable breakages are only one example of the myriad of challenges faced by the electronic communications industry in recent years.
- 1.8 The Authority is well informed of the adverse effects of protracted loadshedding and increasing vandalism and theft of critical network infrastructure. This has resulted in significant CAPEX and OPEX pressures towards efforts to continue to provide quality and resilient services².
- 1.9 The CAPEX and OPEX impact from loadshedding is exacerbated by additional macroeconomic events that have created financial pressures on licensees. These pressures arise out of various interlinked events including:
- 1.9.1 the downward trend in pricing since the cost to communicate debate, which has stimulated uptake and increased traffic volumes on networks,
- 1.9.2 the increase in traffic volumes, which has necessitated further network

as 1.412 billion and an unemployment rate of 5.1%, and India's population as 1.417 billion people and an unemployment rate of 7.33%.

² The State of the ICT Sector Report, March 2024, page 30 and MTN's Response to ICASA's Loadshedding Inquiry 08022024

rollout, upgrades and further resilience efforts to manage the additional capacity, thus increasing related CAPEX and OPEX,

- 1.9.3 consistent hikes in inflation rates and fuel prices, which have added to the challenges, especially in light of network resilience efforts, and
- 1.9.4 the weakening Rand, which has also contributed to aggressive hikes in operators' costs due to the fact that most network equipment used by network operators to increase capacity, to meet demand, is imported and is subject to foreign denominated pricing.
- 1.10 All these macroeconomic events serve to widen the gap between operator's revenues and costs.
- 1.11 The financial pressures have had real impact on network operators and service providers which can be noted by recent publication of price increases³, as well as employment effects. In 2023, MTN announced that it was providing voluntary separation packages⁴, as did Telkom⁵, while Rain announced forced retrenchments⁶. By March this year, both Vodacom⁷ and Cell C⁸ had announced retrenchment initiatives in an effort to curb aggressive increases in costs.
- 1.12 The continued efforts of licensees to ensure the provision of quality and

³ <https://www.itweb.co.za/article/mtn-hikes-postpaid-contract-prices-in-sa/DZQ58vV8zL9MzXy2>

<https://www.vodacom.co.za/vodacom/shopping/plans/red-price-plans-update>

<https://www.itweb.co.za/article/vodacom-hikes-postpaid-fibre-prices/KPNG878NyZNq4mwD>

<https://www.telkom.co.za/deals/cpi-increase>

<https://mybroadband.co.za/news/cellular/513231-cell-c-announces-contract-price-hikes-and-new-data-plans.html>

<https://mybroadband.co.za/news/cellular/531305-rain-increases-prices-for-uncapped-4g-services.html>

<https://liquid.tech/wp-content/uploads/2023/06/Q4-FY23-PRESS-RELEASE.pdf>

⁴ <https://www.itweb.co.za/article/mtn-sa-initiates-early-voluntary-retirement-packages/WnpNgM216Ed7VrGd>

⁵ <https://businesstech.co.za/news/business/695793/telkom-cuts-close-to-1200-jobs-with-more-to-come/>

⁶ <https://bandwidthblog.co.za/2023/08/01/rain-retrenchments-johannesburg-cape-town/>

⁷ <https://www.itweb.co.za/article/vodacom-sa-employees-face-retrenchments/VgZey7JleeEqjX9>

⁸ <https://techpoint.africa/2024/01/17/cellc-considering-workforce-reduction/#:~:text=In%20June%202020%2C%20it%20announced,protest%20approximately%20a%20year%20prior.&text=Its%20workforce%20had%20shrunk%20from,900%20as%20of%20September%202023.>

reliable services at affordable prices while ensuring that they remain sustainable to do so, underscore the commitment of licensees of ensuring access to electronic communications services.

- 1.13 While MTN's commitment is evidenced by, *inter alia*, sustained competitive offerings in the market and best mobile network status⁹ in the face of immense challenges and competition, it remains imperative that the Authority consider these challenges and the significant costs borne by licensees in pursuit of ubiquitous network services.
- 1.14 MTN submits that it is of utmost importance that the Authority encourages growth and development of the sector by creating an enabling environment. The Authority must provide a stable regulatory environment that seeks to encourage investment and incentivises innovative approaches to service provision.
- 1.15 MTN submits that the Proposed Amendments do not seem to meet the abovementioned requirements, and therefore may not serve the purpose of enhancing consumer welfare.
- 1.16 MTN's submission during the 2022 Charter amendment process remains relevant and should be considered alongside this submission. The Authority must consider the evidence demonstrating harm to the retail market for electronic communications services market as a significant factor to be weighed against the untested and unsubstantiated 'concerns' set out in the Explanatory Memorandum. Failure to do so would result in regulations which are fatally flawed and not serving the interests of consumers.
- 1.17 MTN makes its submissions to the specific Proposed Amendments in the sections which follow and as described in the submission outline below.

⁹ <https://www.engineeringnews.co.za/article/mtn-named-south-africas-best-mobile-network-2024-04-08>

2. SUBMISSION OUTLINE

2.1 The remainder of this submission makes specific comment to the Proposed Amendments and is set out as follows:

2.1.1 Section 3 deals with the proposed definitions describing long, medium and short-term bundles and demonstrates that the definitions proposed do not adequately delineate between the bundle validity periods.

2.1.2 Section 4 discusses the merging of the current sub-regulations 8A and 8B to impose uniform regulations over data, voice and SMS. This section demonstrates that it is in fact appropriate to differentiate regulation of data, on one hand, and voice and SMS on the other, as consumers treat these services differently. Differing consumer behaviours in the treatment of the different services and the structure of the services themselves make uniform regulations unnecessary. Uniform regulations would therefore over-regulate voice and SMS, which may have unintended consequences in the marketplace to the detriment of consumer welfare. In particular, the proposed expansion of current out of bundle billing practices is dealt with in this section.

2.1.3 Section 5 contains submissions in respect of the proposed roll over rules. The prescription of the specific way roll-over rules must be implemented by all licensees is an overreach of the Authority's powers, and fails to meet the requirements of rational, reasonable, and proportional regulation. Further, the proposed roll-over rules will have an adverse effect on competition between the licensees and lead to uniformity of product and service design, and increased prices.

2.1.4 Section 6 demonstrates that the proposed data transfer provisions are ultra vires and are not rational, reasonable, and proportional. The proposed unlimited nature of data transfer dramatically increases the risk of arbitrage and fraudulent activities which will necessitate the

design of uniform products and services and increases in consumer pricing.

- 2.1.5 Finally, section 7 deals with the proposed amendment to extend validity periods in the event that services are not rendered due to the fault of licensees. This section demonstrates that there is already sufficient recourse available to consumers in this regard. In addition, the proposal is not practical to implement as determining the cause of the fault is near impossible due to protracted loadshedding, vandalism and theft of network equipment which lead to service interruptions even during non-loadshedding hours.

3. PROPOSED AMENDMENTS TO THE DEFINITIONS

- 3.1 MTN submits that the current definitions of “long-term bundle”, “medium-term bundle” and “short-term bundle” are unclear in that the Proposed Amendments state that:

3.1.1 A short-term bundle *'means a bundle valid for less than seven (7) days from activation'*. This definition does not expressly include 7-day bundles, which means that bundles up to and including 6 days would be short-term bundles.

3.1.2 A medium-term bundle *'means a bundle valid between seven (7) to thirty (30) days from activation'*. In accordance with rules of grammar, “between” is not inclusive of the endpoints in a range whereas “from” includes the endpoints in a range. This means that bundles from 8 to 29 days would be medium-term bundles.

3.1.3 A long-term bundle *'means a bundle valid for more than thirty (30) days from activation'*. Similarly, to the definition of short-term bundle, this definition is not expressly inclusive of 30-day bundles which means bundles from 31 days and above would be long-term bundles.

3.2 Therefore, 7-day bundles and 30-day bundles are not captured by any of the definitions provided.

3.3 MTN proposes that the Authority revise the definitions as follows:

3.3.1 **“Long-term bundle”** means a bundle valid for more than or equal to thirty (30) days from activation; and

3.3.2 **“Short-term bundle”** means a bundle valid for less than or equal to seven (7) days from activation.

3.4 The definition for medium-term bundle should remain the same.

3.5 Notwithstanding the aforementioned, MTN notes that the Proposed Amendments in relation to the definitions of bundle terms/validity periods are only applicable to the proposed roll over rules at sub-regulation 8A (6) and 8A (7). MTN does not support the proposal relating to roll over as we do not believe it is sustainable, as set out in the sections below. Should the Authority reconsider and delete the proposed roll over requirements, the proposed definitions would be rendered unnecessary.

4. PROPOSED MERGING OF SECTION 8A AND SECTION 8B.

4.1 The Explanatory Memorandum states that the proposal to merge sub-regulations 8A and 8B is because the Authority views the two sub-regulations as *“largely identical”*. The merging of the two regulations will expand certain provisions currently applicable only to data to voice and SMS as well. These provisions include the out-of-bundle (“OOB”) billing opt-in rule, roll over of bundles, and transfer of bundles (the “data specific provisions”).

4.2 MTN submits that these data specific provisions were included to address

public concerns around data services in particular. These amendments came about soon after the #DataMustFall campaign and formed part of a multi-pronged approach by the policy makers and regulators to address public sentiment around the cost of data, data depletion and bill shock resulting from a lack of consumer awareness on how data is consumed by background applications, as well as when data bundles were depleted and OOB rates applied.

4.3 The developments in the market since 2016/2017; which include a downward pricing trend, the introduction of the data specific regulations, continuous consumer awareness campaigns, as well as differentiated data products to suit consumer preferences; all drove towards addressing those concerns regarding data. It is common knowledge that the marketplace today is largely different to the one which existed during 2016/2017.

4.4 Therefore, MTN submits that the Explanatory Memorandum is not clear on what evidence is relied on in averring that there is a *'strong consumer resistance to the loss of unused data'* and it has not demonstrated at any point during this consultation process nor the 2022 consultation process that this consumer concern extends to voice and SMS services.

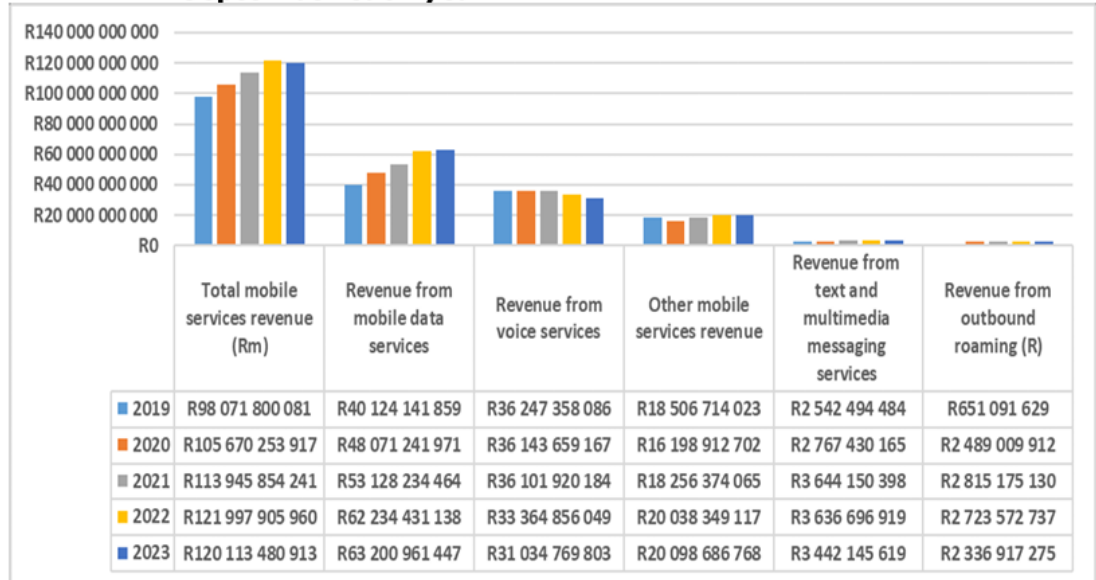
4.5 In fact, MTN submits that concerns around the treatment of voice and SMS bundles are unlikely to be significant. MTN's evidence to support this statement is derived from the fact that currently, [REDACTED]

[REDACTED]

4.6 The Authority published the State of the ICT Sector Report during March 2024 wherein it stated that while total mobile services revenue services has increased over the last 5 years, revenue from voice services decreased by

3.81% over the same period.¹⁰ Revenues from text and multimedia messaging services have remained low.¹¹ The graph below depicts this decline:

Graph 8: Mobile services revenue for the 12 months, ending 30th September each year.



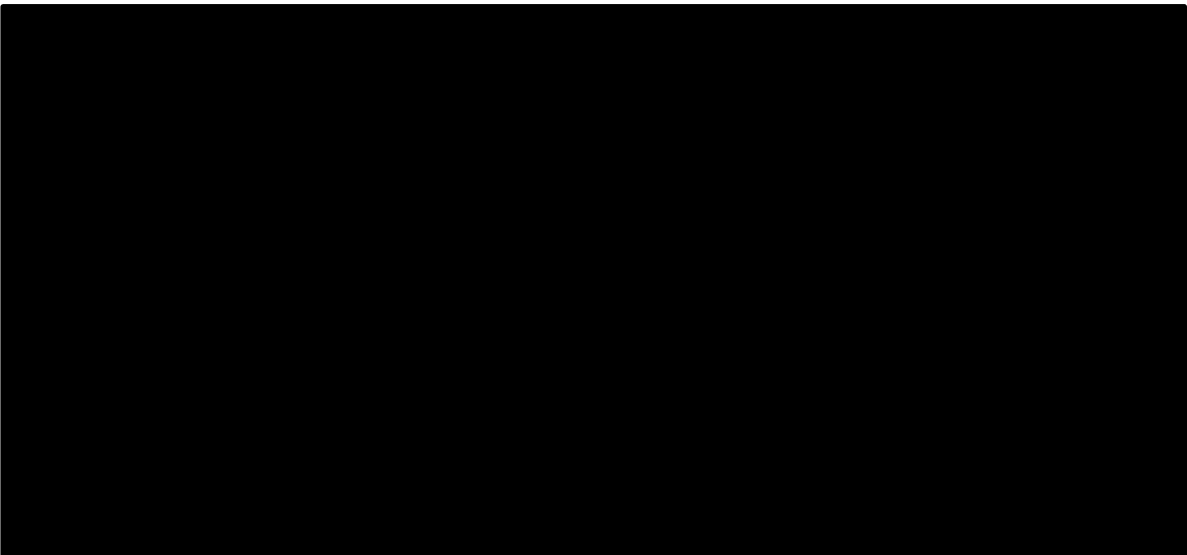
Source: ICASA Electronic Communications Questionnaire 2019 - 2023

Note: This includes retail mobile revenue from the provision of voice services from national and international calls; outbound roaming abroad; mobile data; and text messaging and multimedia messaging (SMS and MMS) and any other mobile revenue. Excludes equipment revenue and termination (interconnection) revenue and any other revenue categories e.g., other wholesale services.





¹⁰ State of the ICT Sector Report, March 2024, page 20

¹¹ ibid



4.8 MTN submits that the above demonstrates a general trend away from voice and SMS usage by end users in favour of data in order to utilise OTT services. This fact is supported by the Authority's own findings that *'the shift to a data driven world and adoption of OTT services that have replaced traditional voice and texting is clearly visible in the data'*.¹²

4.9 In addition to the fact that subscriber behaviour strongly indicates a lack of concern regarding voice and SMS bundles, and therefore a disconnect between the Proposed Amendments and the 'harm' they seek to address, the application of an OOB opt in rule on voice and SMS would have an immediate adverse effect on consumer experience in that once the rule is implemented, 
 resulting in the following:

4.9.1 A reduction in a subscriber's ability to elect how their airtime is utilised. Subscribers show a reluctance to commit to voice minute bundles which is reflected above. Implementation of the proposed OOB opt-in rule may affect the majority of subscribers who wish to continue to apportion the bulk of their airtime towards data bundles and use the remaining airtime as required for ad hoc calls and SMSs. Instead, these subscribers will be forced to apportion their airtime to include voice bundles which may not

¹² State of the ICT Sector Report, March 2024, page 77

suit their requirements.

4.9.2 The voice bundle once purchased may be subject to potentially less favourable expiry periods (in general airtime purchases of above R25 are not subject to any expiry rules).

4.10 MTN submits that the evidence suggests that voice and SMS are assigned less importance than data by the substantial majority of subscribers. In addition, subscribers do not, and have never experienced the same level of bill shock that was experienced in respect of data charges. Therefore:

4.10.1 It is appropriate that voice and SMS are regulated differently. This does not produce a gap in regulation, but rather ensures that each service receives the appropriate level of regulation.

4.10.2 There is no evidence of harm to consumer welfare or market failure to warrant the application of the out-of-bundle opt in, or indeed any of the other data specific provisions, to voice and SMS services. This renders the Proposed Amendments in this regard unreasonable and irrational regulation. Further, the effects of the proposed sub-regulation are not proportional to the benefit sought.

4.11 MTN submits that sub-regulations 8A and 8B are not "*largely identical*" and that to mitigate against the unintended market effects of over-regulation, voice and SMS should continue to be regulated at the current appropriate levels. MTN deals with bundle roll over and bundle transfer separately in the sections which follow.

5. ROLL OVER RULES

5.1 Currently, sub-regulation 8B of the Charter states that Licensees must provide end-users with '*an option*' to roll over unused data. As discussed above, this regulation was intended to empower end-users to mitigate

against loss of unused data in response to public concerns raised around 2016/2017. The sub-regulation as it stands allows licensees to determine the most efficient and effective way of complying, thus balancing the pursuit of regulatory objectives alongside sustainable commercial practices.

5.2 The Proposed Amendments effectively remove this flexibility, and instead prescribe that Licensees must roll over:

5.2.1 50% of the unused portion of medium-term bundles, provided that any unused portion of any bundle rolled over at least twice; and

5.2.2 25% of the unused portion of long-term bundles, provided that any unused portion of any bundle be rolled over at least once.

5.3 Besides the fact that the wording of the Proposed Amendments regarding roll over are unclear and conflicting¹³, MTN has several concerns with these Proposed Amendments and submits that the proposed roll over rules essentially:

5.3.1 amount to the fixing of trading terms and conditions by a regulator. Although fixing trading terms and conditions by a regulator is not *per se* prohibited by the Competition Act, No.89 of 1998, the anti-competitive effects on the market will be the same as if made by agreement between competitors, and

5.3.2 are an alternative method of prescribing expiry periods applicable across the differentiated term bundles, which even the Authority has stated in its Explanatory Memorandum will “*undermine market dynamics and limit end-consumer choice*” ultimately resulting in increased prices.

¹³ The percentage of the unused portion of the bundle to be rolled over once is clear, however in respect of medium-term bundles, it is unclear how much of the unused portion must be rolled over second time round. In fact, the sub-regulation currently reads that the entire unused portion should be rolled over twice which directly conflicts with the requirement that 50% of the unused portion be rolled over initially.

- 5.4 MTN submits that the Proposed Amendments in respect of the roll-over rule:
- 5.4.1 Unlawfully extend the Authority's powers beyond its legal mandate as the Proposed Amendments seek to interfere with the commercial terms and conditions between Licensees and their consumers, contrary to the objects of the Act.
 - 5.4.2 Are not rationally connected to their purpose in that the Proposed Amendments do not in fact achieve their stated objectives, and ultimately will harm consumer welfare.
 - 5.4.3 Are needlessly onerous upon licensees in that the effects on licensee networks and internal systems pose significant CAPEX and OPEX constraints which are disproportionate to the unsubstantiated concerns that the Authority seeks to remedy.
 - 5.4.4 Will substantially lessen or prevent competition in the relevant retail market for electronic communications services by purporting to fix trading terms and conditions of licensees which are meant to compete with each other.
 - 5.4.5 The extension of the roll over rules to voice and SMS is not appropriate and amounts to over-regulation where a regulatory impact assessment has not been done.
- 5.5 MTN submits that the Proposed Amendments should not be enacted, and that the Authority should continue to encourage innovative approaches to data roll over between competing licensees. The reasons are expanded upon below.

The Proposed Amendment does not pass the doctrine of legality – it is ultra

vires

- 5.6 The Authority is authorised to act in accordance with, and within the confines of, its empowering law. Actions of the Authority which reach beyond its mandated powers are ultra vires.
- 5.7 Section 69 of the Electronic Communications Act (the "Act") empowers the Authority to prescribe minimum standards for end-user and subscriber service charters. These minimum standards may include, inter alia, the provision of information to end-users, complaint procedures, end-user and subscriber charging, billing, collection and credit practices, and any other matter of concern to end-users¹⁴.
- 5.8 What is envisaged in section 69 of the Act is the development by the Authority of minimum criteria that must be observed by Licensees when providing services to end-users to ensure fairness, equality, and quality of service to end-users. Sub-regulation 2 of the Charter affirms this interpretation, as it states that the purpose of the Charter is to "*prescribe minimum standards for electronic communication services to an end-user*".
- 5.9 It is important to recognise that section 69(5) of the Act does not give the Authority the power to:
- 5.9.1 interfere in the contractual relationship by setting out product terms and conditions between licensees and end-users,
- 5.9.2 prescribe the products and services, including value added services which must be provided to end-users, and
- 5.9.3 prescribe the manner in which those products and services, including value-added services are provided.

¹⁴ Section 69(5) ECA

5.10 The Authority is therefore mandated to ensure that consumer welfare is protected but must refrain from undue interference in the commercial activities of licensees when doing so.

5.11 MTN submits that the proposed provisions of sub-regulation 8A (6) and (7), which prescribe:

5.11.1 the percentages of the unused portions of bundles that must be rolled over, and

5.11.2 the length of the roll over period,

amount to a prescription of contractual terms governing the provision of services to end-users. This falls outside the remit of the Authority's powers in section 69(5) of the Act, making it *ultra vires*.

5.12 In addition, the proposed regulation 8A (6) and (7) is in opposition to the objectives of the ECA, in that it amounts to an undue interference in the commercial activities of Licensees by:

5.12.1 dictating commercial terms that must be applied by the Licensees in making products and/or services available to end-users, and

5.12.2 prescribing the value-added services and how they should be applied by licensees to end-users, thus creating uniformity of product/service offerings of licensees. This comes with a set of competition and economic concerns which are detailed more fully below.

The Proposed Amendments are irrational

5.13 For the Authority's regulations to be rational, there must be a rational link between the regulation and the purpose for which it is intended.

- 5.14 The Explanatory Memorandum states that the purpose of the Proposed Amendments to the current roll over provisions is to ensure that end-users are not unduly disadvantaged by the total loss of their purchased bundles and further benefit them by minimising the risk of premature expiry of bundles.
- 5.15 MTN submits that there is no rational connection between the roll over percentages and terms proposed and the stipulated purpose of the Proposed Amendment.
- 5.16 The current regulation does not provide for any roll over percentages. Accordingly, licensees offer various roll over value-added services in accordance with the way their internal IS systems are configured, and their varied network constraints. There is no evidence offered which demonstrates that the proposed prescribed percentages and frequency of roll over will be more effective than the current roll over practices in achieving the stated purpose.
- 5.17 The Authority is seeking to ensure that end-users are able to manage the usage of the bundles that they purchase. MTN submits that there are already mechanisms in place to achieve this, being the current roll over and data transfer provisions, as well as other mechanisms such as:
- 5.17.1 A varied product portfolio. This enables subscribers to exercise their discretion in respect of the quantity of data/voice/SMSs, the validity period, and the frequency with which they purchase bundles, all in accordance with their individual preferences and requirements.
- 5.17.2 Linked to the above, the provision of micro-bundles which allows subscribers to purchase small bundles more likely to be fully consumed prior to expiry.

- 5.17.3 Auto-renew bundles, which enables automatic roll over and avoids out-of-bundle charges.
- 5.17.4 Depletion notices sent to subscribers in line with the Charter, which enables subscribers to monitor bundle depletion and manage usage.
- 5.17.5 Data share, which is also a feature of the Charter but had been offered by MTN as a value-added service prior to its inclusion into the Charter, which enables subscribers who may not be able to deplete data on their own to share data with friends and family.
- 5.17.6 Depletion and consumption rules which prioritise usage of bundles which expire first.
- 5.18 The Authority has not demonstrated that currently, and after the last two amendments to the Charter, end-users still experience a high loss of unused services. Therefore, the purpose of the Proposed Amendment in respect of roll over rules has not been established. As such, the Proposed Amendments in this regard are irrational.

The Proposed Amendments are unreasonable and disproportionate

- 5.19 The Proposed Amendments in respect of roll over rules would require extensive development of current information systems of Licensees and have impact on resources and networks. Given the objective of the Proposed Amendments and the fact that these objectives may already be achieved through the current Charter and business practices, MTN submits that the Proposed Amendments are unreasonable and disproportionate.
- 5.20 The business models of Licensees and, by implication, their product offerings, are based on product validity periods and billing cycles. This is impacted by revenue recognition factors, purchase and activation design, depletion rules, and expiration of product value.

5.21 Licensee information systems, by nature of the business model and product offerings are developed to cater for regular depletion / expiry, and subsequent removal, of products from subscriber accounts. This is fundamental to information system design and implementation, including capacity dimensioning.

5.22 [Redacted]

5.23 This system was determined to be the most efficient solution to satisfy the requirements of the 2019 amendments to the Charter in respect of roll over rules.

[Redacted]

5.25 [Redacted]

5.26 The abandonment of the solution required to comply with the 2019 Charter requirements would necessitate the development of a completely new

solution. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

- 5.27 Continuous amendments by the Authority to, *inter alia*, roll over rules is not sustainable and is unreasonable especially in light of the fact that there is no evidence of existing consumer harm or market failure.
- 5.28 From a network perspective, MTN bases its services on carefully considered information about the service requirements of end users and is required to take into consideration the service requirements of end-users over a specific period and for specified volumes which impacts network provisioning and planning. Network teams dimension the network based on historic data and trended growth influenced by technology, user density, device types and product types. Catering for carry over would require further network outlay to accommodate such capacity.
- 5.29 MTN's network planning and resultant ability to provide quality services to end-users occurs well in advance due to long lead times for network deployment. Capacity is planned to cater for this requirement and to allow for a margin on the network for unexpected traffic growth volumes.
- 5.30 Where MTN is unable to properly predict or estimate the time frames of data usage and traffic across its network due to increased usage-windows, it may cause significant degradation in quality of services. Conversely, if capacity is over catered and under-utilised, this increases the costs of providing services to end-users.
- 5.31 In essence, network planning would be impacted by the proposed roll over rules in that capacity would need to be increased to cater for expected increases in traffic over time caused by the extended expiry of bundles, and in order to mitigate against under-utilisation of capacity. This further

drives up prices for end-users in respect of those services by disincentivising aggressively discounted limited use/time and personalised bundles.

- 5.32 The limited consumer benefit, if any, that would be derived from implementation of the Proposed Amendments to the roll over rules cannot be balanced against the significant adverse impact on consumer welfare and the substantial additional costs, systems development and network impact that would be faced by licensees in order to give effect to the Proposed Amendments. Therefore, MTN submits that the Proposed Amendments are unreasonable and disproportionate.

The Proposed Amendments would have anti-competitive effects on the market

- 5.33 The retail market for mobile services in South Africa is characterised by several players who must compete on both price and product factors. Non-price factors include factors such as quality of service, product variety, differentiation of products with value-added services or other consumer benefits. Competition on price and non-price factors is necessary as the South African market contains consumers with disparate resources and therefore various, unique requirements and preferences.
- 5.34 South African consumers are sophisticated and driven towards obtaining the most value for their money. In addition, the barriers to switching between providers of mobile services is low, which enables customers to respond expediently to offerings in the market.
- 5.35 These factors act as significant incentives for providers of mobile services to distinguish their products and services to win customers with more attractive offerings, and to serve the various niche requirements in the market. Value-added services, such as data roll over and transfer, are one mechanism used by providers of mobile services to attract consumers and

provide differentiated benefits attached to their products. This is evidenced by the fact that operators had already been offering similar services before these services were regulated by the Authority¹⁵.

5.36 The flexibility enabled by the current regulation provides this additional avenue for licensees to differentiate their products through value-added services, as well as ensure that their systems and networks are not unsustainably burdened. Below is a table depicting the different roll over terms and conditions of five licensees:

OPERATOR	DATA ROLL OVER TERMS
MTN	Carry over data by buying the same bundle type and validity period (any denomination) or by buying a higher data bundle. Unused portion adopts the expiry date of the new bundle. Automatic roll over for postpaid subscriptions. ¹⁶
Vodacom	Carry over data by purchasing another bundle of the same size and validity before your existing bundle is depleted or expired. The validity of the existing bundle is extended to the validity of the last bundle of the same size and validity that was bought. Extensions can happen numerous times as long as there is still some data remaining and the bundle has not expired ¹⁷ .
Cell C	Customers can extend their data validity by 1, 7 or 30 days at a time. Customers with 100MB or less remaining will be able to roll over their data completely free for an additional 1 or 7 days. Customers that roll over between 101MB and 500MB of data can roll over free for an additional day. For larger bundle

¹⁵ MTN submission re Notice of Intention to Amend the Regulations in Relation to the End-User and Subscriber Service Charter, Government Gazette No. 46153 Dated 31 March 2022, Vodacom's Submission on Draft End-user and Subscriber Service Charter Amendment Regulations

¹⁶ <https://www.mtn.co.za/home/help/content/what-is-data-role-over->

¹⁷ <https://help.vodacom.co.za/personal/home/9373/9375/1023087/#:~:text=All%20Vodacom%20customers%20can%20extend,and%20validity%20that%20was%20bought.>

	balances and extensions customers will pay a nominal fee to roll over the data, only paying for additional time ¹⁸ .
Telkom	Any unused inclusive anytime data rolls over to the next calendar month. The rolled over data will be depleted first before the newly allocated inclusive data is used. The unused inclusive night surfer data is not carried over ¹⁹ .
Rain	Monthly Data on Rain packages will only expire at the end of the next month. This means that if you haven't used all of your monthly data by the end of the month, it will roll over to the next month. Rolled over data will be consumed first before new data ²⁰ .

5.37 This flexibility is vital for competition in the relevant market. As the Authority is aware from the previous round of consultations, licensees offer several packages of services, with different limitations (URL specific, time dynamic, fixed location), sizes (micro bundles through to rich bundles), and validity periods (short-term bundles to long-term bundles), and bundles with different combinations of each. Each type of bundle carries a price point which can be discounted more robustly where it allows for optimising capacity or increasing the predictability of capacity on licensee networks. This contributes to dynamic competition between licensees in terms of the products and services, and value-added services, that they offer.

5.38 This is a demonstration of second-degree price differentiation in practice, which usually involves sellers offering a “menu” of product-price combinations to all consumers. This allows consumers to self-select

¹⁸ <https://www.cellc.co.za/cellc/data-guidelines>

¹⁹ <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://images.telkom.co.za/backend-files/2023-11/Frequently%20Asked%20Questions%20for%20LTE%20Post-paid%20Data%20Plans%20March%202022.pdf>

²⁰ <https://help.afrihost.com/entry/monthly-lte-data-rollover-explained>

offerings which best suit their needs²¹. As this practice allows operators to optimise capacity offered by their networks which ultimately leads to effective network capacity management and higher efficiencies, these benefits can and are translated into further consumer benefits.

- 5.39 More than impairing the flexibility of Licensees to offer differentiated services and various price points, the Proposed Amendments go further than setting standards, and extend into setting trading terms and conditions for licensees in respect of the value-added services that they offer. The adverse effects of doing so are significant and would tend to mirror collusive practices amongst competitors to set trading terms and conditions. These include reductions in output, consumer choice, innovation and quality goods or services and a corresponding increase in uniformity of products and services resulting ultimately in increased prices.
- 5.40 This is illustrated in cases where competitors do not collude directly on prices, or divide markets, but rather the collusion in each case permits firms to manipulate the rules under which the independent commercial decisions of the colluding firms were made. In other words, the way in which firms make commercial decisions is agreed upon and uniform. This induces anticompetitive market conditions and narrows the scope of competition between the competitors²². MTN submits that the Proposed Amendments would have the same effect.
- 5.41 This type of market practice between competitors is considered by competition authorities world over to be one of the more egregious market behaviours and attracts the largest fines because of the considerable and immediate dampening effect on competition, and ultimate harm to

²¹ Bishop, S. and Walker, M. (2010). *The Economics of EC Competition Law: Concepts, Application and Measurement*. London: Sweet & Maxwell. Page 492; and OECD (2016). *Price Discrimination: Background Note by the Secretariat*. Page 7.

²² *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 *Wis. L. Rev.* 941 (2000), from page 941. Cases referenced include *National Society of Professional Engineers v. United States* 435 U.S. 679 (1978), *Bates v. State Bar of Arizona* 433 U.S. 350 (1977), and others.

consumer welfare that results.

- 5.42 A regulatory impact assessment is required to demonstrate that the current mechanisms are inadequate to achieve the purpose of enabling end-users to manage the usage of their bundles. Alternatively, the Authority must identify a market failure which requires the Proposed Amendment as a remedy.
- 5.43 An impact assessment is particularly important in this instance, where the Authority is proposing to regulate trading terms and conditions which will have the effect of limiting end-user choice by negating product differentiation between competitors, limiting innovation on non-price competition aspects, and ultimately increasing prices for consumers by disincentivising heavily discounted personalised and social bundles.
- 5.44 MTN submits that no market failure exists which could justify regulation of competitors' trading terms and conditions. The Authority seeks to ensure that consumers are able to optimise the use of their bundles. MTN has demonstrated that there are several mechanisms already available to consumers to do so. In the event that a Regulatory Impact Assessment reveals that there is indeed scope for improvement in this regard, MTN submits that much lighter touch regulation would be sufficient to achieve the desired outcomes.
- 5.45 It is important that markets are regulated in a manner which provides market players the maximum amount of flexibility to conduct their commercial activities and compete for customers in order to:
- 5.45.1 ensure that market players can respond effectively and efficiently to changes and developments in the market; and

- 5.45.2 foster a healthy competitive environment and stimulate the continued evolution of products and services, including value-added services which ultimately increase consumer choice and welfare.
- 5.46 Allowing licensees to innovate ensures that a wide variety of consumer demands are met while stimulating internal efficiencies that can be passed onto consumers. Overly prescriptive regulation limits innovation and development in this way and curtails opportunities for dynamic competition.
- 5.47 In addition, the application of roll over to all bundle types as proposed would create actual inefficiencies for licensees for example, by increasing unearned revenue risk. Licensees are legally obligated to report revenue in line with the usage and/or expiry of the services, and not upon purchase of these services. The extension of the roll over rules dramatically increases the unearned revenue reported by licensees which leads to the creation of internal inefficiencies. These inefficiencies would ultimately lead to increased pricing.
- 5.48 In summation, MTN submits that the Proposed Amendments in respect of roll over rules remove several elements on non-price competition including product differentiation, and leaves licensees to compete only on price. As already illustrated in the introductory remarks of this submission, there are several macro-economic events facing our market which already substantially constrains licensees' ability in respect of pure price competition. In fact, the Proposed Amendments will result in higher prices paid by consumers.

The extension of the roll over rules to voice and SMS is not appropriate

- 5.49 The evidence produced above, and corroborated by the Authority²³,

²³ State of the ICT Sector, March 2024

strongly indicates a trend away from voice and SMS services, and therefore a lack of significant concern when compared to customer behaviour and sentiment around data. Therefore, MTN submits that there is in fact no substantial harm or market failure which exists that necessitates correction through the imposition of such prescriptive regulation. The extension of the Proposed Amendments in relation to roll over rules to voice and SMS services is not rational, reasonable or proportional to the objectives it seeks to achieve.

- 5.50 MTN submits that the rationale applied to roll over rules is connected, and therefore applicable in large, to bundle transfer. MTN makes its submission in respect of data transfer in the section which follows.

6. TRANSFER RULES

- 6.1 The Charter currently regulates data transfer in sub-regulation 8B (4) which states that licensees must provide end-users with an option to transfer data to other end-users using the services of the same licensee.
- 6.2 This regulation, in conjunction with the data roll over sub-regulation, is intended to enable end-users to mitigate against loss of unused data. Similar to the existing roll-over rules contained in the Charter, the current data transfer rules allow licensees to determine the best way of complying to ensure that their internal systems and networks are not unduly burdened or subject to abuse.
- 6.3 In fact, data transfer is also a value-added service that MTN, and other licensees provided before regulation was promulgated to mandate same. This is further evidence of the fact that Licensees are incentivised to differentiate the products which they offer to meet consumer needs and compete for market share, as well as the fact that value-added services are an effective method of providing differentiated services that provide specific benefits to consumers.

- 6.4 The Proposed Amendments at sub-regulation 8A (9) and (10) would obligate all Licensees to allow unlimited amounts of data transfer for end-users and the persons to whom they transfer bundles, as well as the transfer of the rules applicable to the transferred bundles. Similar to the proposed roll over rules, the Proposed Amendments effectively remove the ability of Licensees to exercise their expertise and experience in a flexible way to respond to changes in consumer requirements and market dynamics in general by prescribing the specific manner in which data transfer must occur.
- 6.5 MTN has several concerns with these Proposed Amendments regarding the transfer of bundles which largely mirror its concerns in respect of the proposed roll over rules. MTN submits that the Proposed Amendments in respect of transfer of bundles:
- 6.5.1 Unlawfully extend the Authority's powers beyond its legal mandate as the Proposed Amendments seek to interfere with the commercial terms and conditions between Licensees and their consumers, contrary to the objects of the Act.
 - 6.5.2 Are not rationally connected to their purpose in that the Proposed Amendments do not in fact achieve their stated objectives, and ultimately will harm consumer welfare.
 - 6.5.3 Are needlessly onerous upon licensees in that the effects on licensee networks and internal systems pose significant CAPEX and OPEX constraints which are disproportionate to the unsubstantiated concerns that the Authority seeks to remedy.
 - 6.5.4 Will substantially lessen or prevent competition in the relevant retail market for electronic communications services by purporting to fix trading terms and conditions of licensees which are meant to compete

with each other.

- 6.5.5 Do not allow licensees to protect themselves from abuse, in particular arbitrage which is already an issue in the market.
- 6.5.6 Is not appropriate insofar as the Proposed Amendments seek to extend the application of bundle transfer to voice and SMS, thus amounting to over-regulation.
- 6.6 Below, MTN expands only upon the additional items of concern in respect of the Proposed Amendments regarding bundle transfer in order to avoid lengthy repetition and unnecessary duplication.

The Proposed Amendment is ultra vires

- 6.7 For the same reasons elucidated in paragraphs 5.6 to 5.12 above, the Proposed Amendments in respect of bundle transfer in sub-regulation 8A(9) and (10) is *ultra vires* in that they amount to an undue interference in the contractual terms governing the provision of services to end-users by Licensees.

The Proposed Amendment is irrational

- 6.8 As already set out, there is no supporting evidence which demonstrates that:
 - 6.8.1 Issues regarding loss of data due to expiry are still significant,
 - 6.8.2 Issues regarding loss of voice and SMS bundles are prevalent, especially considering that the vast majority of end-users opt not to purchase and use these types of bundles, and

6.8.3 There is indeed a lacuna in regulation in regard to voice and SMS, as opposed to an appropriate differentiation of regulation given the different dynamics attaching to the different services.

6.9 Given that there are several mechanisms already available to end-users which enable them to effectively manage and optimise usage of the bundles which they purchase, MTN submits that the reasoning behind the Proposed Amendments is flawed.

The Proposed Amendment is unreasonable and not proportional

6.10 MTN submits that in order to effect unlimited data transfer would require a fundamental change to the existing information systems of licensees and would require extensive development [REDACTED]

6.11 From a network perspective, and as explained above, the effective planning and management of networks is imperative to ensuring efficiencies in the cost of provisioning services. Unlimited data transfer as proposed would render MTN unable to properly predict or estimate the time frames of data usage and traffic across its network which may cause significant degradation in quality of services. Conversely, if capacity is increased to cater for unlimited data transfer, this increases the risk of underutilised networks, increasing the cost of service provision and resulting ultimately in increased consumer prices.

6.12 Given that the adverse impact on consumer welfare and the additional costs, systems and network burdens that would be faced by licensees in order to give effect to the Proposed Amendments to bundle transfer far outweigh the limited benefit that could be derived from implementation of same, MTN submits that the Proposed Amendments are unreasonable and

disproportionate.

The Proposed Amendments would lessen or prevent competition

- 6.13 Similar to the submission regarding bundle roll over, the Proposed Amendments go further than setting standards, and into setting trading terms and conditions for licensees in respect of the products that they offer. This is because licensees will all have to adjust their trading terms and conditions in the same way in line with the regulations. This will in effect lessen competition in the relevant retail mobile services markets.
- 6.14 As the Proposed Amendments seek to standardise terms and conditions of licensees, it is vital for an impact assessment to be conducted or for a severe market failure to be identified in order to balance the adverse effect of the regulation against the harm caused by the market failure sought to be rectified. MTN submits that no market failure exists which could justify regulation of trading terms and conditions.

Risk of Arbitrage

- 6.15 As discussed above, data transfer is a value-added service which MTN has offered to the retail market, as '*data share*', before the Charter was amended to mandate these offerings. The data share service was offered by MTN to allow customers to share data with friends and family, and to enable customers to optimise their data usage and mitigate against loss of data at expiration.
- 6.16 However, and as with all products, services and other benefits which licensees may elect to provide, licensees are always entitled, and must remain empowered, to protect against abuse of their products/services and the network over which they provide these products and services. This is because abuse poses significant adverse effects on both financial and non-financial elements, which make continued provision of the

product/service as designed, or at an accessible price point, unfeasible. In addition, protracted and unmitigated abuse severely degrades the experience of other customers on the network.

- 6.17 Accordingly, when data share was enabled by MTN, product rules had to be developed to mitigate against abuse which would otherwise alter MTN's decision to provide the data share value-added service. The product rules are necessary to mitigate against risk to MTN's systems, networks, business and customers.
- 6.18 Business rules necessary to mitigate against these risks include limitations on the number of persons to whom data may be transferred, as well as the types of products to which data transfer may be reasonably applied.
- 6.19 For example, it is not reasonable to apply data share in respect of fixed data / broadband products. Fixed broadband products are, by definition, used in a fixed location and cannot be used on the move in the same way that mobile data may be consumed. As fixed products are used differently, and in a more limited way than mobile products, the pricing of fixed products is based on different factors than mobile products. This is necessary, and beneficial to end-users who are more likely to use greater amounts of data in a fixed location, and thus benefit from the lower price per unit of data.
- 6.20 If licensees must allow for unlimited data transfer in respect of fixed data products, this essentially negates the limited use of the product in that it will no longer be used in a fixed location. The pricing of fixed products will therefore have to be adjusted to allow for the more mobile nature of the usage of data and consumer welfare will therefore be adversely affected in this regard.
- 6.21 Similarly, it would no longer be possible to provide currently heavily discounted single/limited URL bundles and 'personalised bundles' as these

are particularly susceptible to abuse. The risk of abuse is exacerbated by the requirement to extend further transfer and expiry rules on the already transferred bundles.

- 6.22 MTN submits that unlimited bundle transfer poses a significant arbitrage risk and the creation of an unregulated secondary market which poses further risk to consumer welfare. This is evidenced by the fact that abusers already utilise MTN's data share to create an unregulated secondary market and resell retail data purchased by MTN to other users.
- 6.23 For example, if MTN is required to provide data share in respect of all bundles, including heavily discounted limited bundles such as URL specific data, or short-term bundles, a fraudster may sell these bundles without disclosing those limitations. An aggrieved customer will not have adequate recourse available to him/her in this circumstance.
- 6.24 Tracking of this abuse is already challenging, and MTN has to utilise various methods and internal resources to track trends in this regard. Please see screenshots of this abuse attached to this submission as Annexure A1 and A2. These snapshots are on social media platforms which are difficult to monitor given the ease with which offers such as these can be posted and removed when detected.
- 6.25 The value-added service rules which limit the number of persons to whom transfer can be made, as well as further data transfer protect MTN's network, serve to protect the value-added proposition itself, as well as consumer welfare against abuse and fraudulent activities.
- 6.26 MTN and other licensees must remain entitled to protect themselves, their products and their customers against abuse and fraud in this manner. Removing this ability from licensees means that new systems would be required to:

- 6.26.1 Provision the value-added service in a manner obligated by regulation,
- 6.26.2 Track all the transfer of data across an unlimited amount of users, and enable all the different product rules across the data transfer,
- 6.26.3 Effectively track and monitor against abuse and fraud, and
- 6.26.4 Enact appropriate enforcement measures against abusers/fraudsters.
- 6.27 As already demonstrated in this submission, price differentiation is often beneficial to consumer welfare in that it allows licensees to tailor products and services dynamically and at various price points which ultimately increases consumer choice and the ability of consumers to purchase bundle types which best suit their individual requirements. Accordingly, the Authority's statement in the Explanatory Memorandum that *"such a secondary market can only exist where there is a significant differentiation in the unit price of bundle services between larger and smaller denomination bundles. Further, such differentiation is per se disadvantageous to consumers, according to the Competition Commission"* is inaccurate and simplistic.
- 6.28 MTN submits that unlimited data transfer would render the continued provision of heavily discounted personalised and otherwise differentiated products a large commercial risk. This would likely result in the removal of these types of products and services from the market, reducing consumer choice, and resulting in an increase in overall consumer spend. The Proposed Amendment will adversely impact consumer welfare and is therefore not in line with the purpose of the Charter.

The extension of the transfer rule to voice and SMS is not appropriate

- 6.29 As already explained in 4.5 to 4.8, there appears to be lack of significant concern regarding voice and SMS in the marketplace. Therefore, MTN

submits that there is in fact no substantial harm or market failure which exists that necessitates the imposition of regulation which would have significant unintended and adverse effects. The extension of the Proposed Amendments in relation to bundle transfer to voice and SMS services is not rational, reasonable or proportional in the circumstances.

7. VALIDITY PERIOD EXTENSIONS

7.1 MTN submits that the obligation proposed in subsection 8A (11) requiring Licensees to compensate end-users where they are unable to utilise bundles due to a fault attributable to the Licensee is unreasonable, irrational and disproportional because:

7.1.1 The Explanatory Memorandum states that the Proposed Amendment obligating licensees to extend validity periods is to ensure that end-users who are unable to use services due to the fault of the licensee are able to enjoy the full value of bundles purchased.

7.1.2 MTN submits that this aspect is already adequately covered in the Charter in that Licensees are obligated to provide services according to regulated standards of quality, and end-consumers are entitled to a rebate where services not meeting the QoS standards are not provided in terms of the agreement between them and the relevant licensee.

7.1.3 In addition, service and/or product quality (where applicable) is already regulated in terms of the Code of Conduct for Electronic Communications and Electronic Communications Network Services

Licensees ("Code of Conduct"). Moreover, the Code of Conduct currently provides for remedies where a product or service is defective.

7.1.4 It is therefore not clear why proposed sub regulation 8A (11) is required when end-users already enjoy the protection of both the Charter and the Code of Conduct.

7.1.5 The Authority has not provided reasons why the Proposed Amendments seek to impose additional remedies where these are addressed elsewhere in the Charter and in addition to what is already provided for in the Code of Conduct. Therefore, MTN submits that the proposed obligation is not warranted because it is a duplication.

7.2 Finally, the Proposed Amendment requires a fault on the part of the licensee to be established before providing an extension on the validity period of a particular bundle. MTN submits that in the current context, this requirement is overly complex and burdensome to administer on either the part of the licensee or the end-consumer.

7.3 This is because network outages commonly occur due to the effects of loadshedding, which extend far beyond power outages for a specified period. Loadshedding exacerbates vandalism and theft at network sites, or other damage or destruction of equipment due to power surges once the loadshedding period has ended. These lengthen the duration of outages and extensive investigation is required to determine the causes of these outages, which does not occur in real time.

7.4 The resources which would be required to perform real time monitoring and identification of the causes of network outages would be substantial, especially for providers of networks which cover the country, including hard to reach areas. This would require extensive system development, which is lengthy to complete, and significantly increase the costs of compliance, which in turn would have an adverse knock-on effect on

pricing.

- 7.5 Having regard to the fact that end-consumers already have various avenues to pursue in the event that they do not receive services as regulated by the Charter, the Code and their agreements with licensees, and the fact that this additional regulation would have significant onerous effect on licensees and a knock-on effect to end-consumers, the Proposed Amendment is disproportionate and unwarranted.

8. CONCLUSION

- 8.1 In conclusion, MTN submits that the Proposed Amendments seek to remedy circumstances which arose 8 years ago, and which have already been subject to remedial regulation and to the efforts of licensees to continue to serve their customers and compete fiercely. The objective which the Proposed Amendments seek to achieve is therefore already achieved. Further regulation is superfluous and in fact results in adverse unintended effects attached to overregulation.
- 8.2 Voice and SMS services do not require the same level of regulation that data requires. The Explanatory Memorandum makes oblique reference to concerns around bundle expiration and speaks to a lacuna in regulation. However, facts indicate that consumers have no desire to commit themselves to set amounts of voice minutes or SMS, and in fact SMS usage is unsubstantial. This indicates that voice and SMS services do not suffer from a lack of regulation, but rather receive an appropriate level of regulation.
- 8.3 The impact that the Proposed Amendments will have is significantly negative. Licensees would be unduly burdened in that internal systems would need to be redeveloped and networks would lose efficiencies. Competition will be dampened in a similar manner wrought by collusive practices in respect of trading terms and conditions, and products will

become more uniform as providing heavily discounted differentiated products will be less feasible. Each of these effects would ultimately serve to adversely impact consumer welfare by reducing consumer choice and increasing prices.

- 8.4 MTN urges the Authority not to enact the Proposed Amendments as published. Should the Authority suspect that there are in fact valid concerns as mentioned in the Explanatory Memorandum, the Authority must conduct a regulatory impact assessment in order to determine the actual level of consumer harm, if any, in order to ensure that any further amendments are necessary, appropriate and proportional.