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ICASA
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Attention: Councillor Botlenya Mokhele

Mobile Broadband Service Inquiry Committee

By email: MarketInquiry2018@icasa.org.za

BMokhele@icasa.org.za

Dear Councillor

CELL C SUBMISSION IN RESPONSE TO THE MOBILE BROADBAND SERVICES MARKET INQUIRY DISCUSSION DOCUMENT (NON-CONFIDENTIAL, REDACTED VERSION)

1. We refer to the on the Mobile Broadband Services Market Inquiry Discussion Document published by the Authority on 29 November 2019.

2. Cell C appreciates the decision of the Authority in granting the extension to provide written comments to the Discussion Document.

3. Cell C's submission in response to the Discussion Document on the Mobile Broadband Services Market Inquiry is included bellow.

4. Cell C wishes to apply for confidentiality in respect of this submission, the information contained in the document may be business-specific and financial documents, commercial strategic documents, or agreements already protected by confidentiality.

5. Cell C will submit two submissions to ICASA. One version will be the confidential version with the ICASA Form requesting confidentiality in terms of section 4D of the ICASA Act, 2002 as amended, including sections in the submission clearly indicating in bold which information is confidential. A non-confidential (redacted) submission will be made available separately.

6. Cell C looks forward to engaging with ICASA should you have any queries on Cell C's written submission.

7. Cell C confirms its readiness to participate in any subsequent consultations and oral hearings that might be called by ICASA.

Yours sincerely

Mr Themba Phiri
Executive Head: Regulatory

CELL C SUBMISSION IN RESPONSE TO THE MOBILE BROADBAND SERVICES MARKET INQUIRY DISCUSSION DOCUMENT

Cell C Limited (Cell C) is the third mobile network operator, launched in 2001. Almost 2 decades later, Cell C continues to challenge the incumbent licensees, MTN Pty Ltd (MTN), Vodacom Pty Ltd (Vodacom), and Telkom SA SOC Ltd (Telkom), but at significant cost to itself.

Cell C participated fully in the ICASA's market prioritization inquiry that was initiated in 2017, which dealt with the definition of "priority markets", and has contributed a large amount of data to ICASA and to the Competition Commission to assist the Commission in its own inquiry into the high prices of mobile data.

Cell C is supportive of the ICASA process described in the Mobile Broadband Services Market Inquiry (Discussion Document), and looks forward to a positive outcome for competition in the sector, the consumer, and the broader economy.

This submission is therefore structured as outlined below:

1. Background to the Discussion Document
2. Process followed by ICASA: Market Definition
3. Additional commentary on markets identified and considered by ICASA
4. Inputs to the relevant market
5. Remedies proposed
6. Conclusion and next steps

1. Background to the Discussion Document

1.1 In December 2013, the Minister of Communications published SA Connect, the National Broadband Policy, which gave effect to the vision articulated in the National Development Plan (NDP), namely "*a seamless information infrastructure by 2030 that will underpin a dynamic and connected vibrant information society and a knowledge economy that is more inclusive, equitable and prosperous*".

1.2 In September 2016, the Department of Telecommunications and Postal Services (DTPS) published the National Integrated ICT Policy White Paper (ICT Policy Document). The policy statements in this document states that "*Information and Communication Technologies (ICTs) can play a key role in facilitating all the objectives of the NDP and this White Paper sets out how Government will realise this potential*". It also notes that there will be a "*widespread communication system that will be universally accessible across the country at a cost and quality that meets the communication [needs] of citizens, business and the public sector and provides access to the creation and consumption of a wide range of converged applications and services required for effective economic and social participation*".

1.3 Other relevant policy goals include:

1.3.1 "*The radio-frequency spectrum is a national resource. Government is therefore obliged by the Constitution to ensure maximum public value from its use and to ensure that it enhances rather than stifles equality in the country. This includes managing and allocating spectrum and the networks and services carried using this resource. The policy framework must therefore promote inclusive economic growth and investment while facilitating radical socio-economic transformation*".[1]

1.3.2 "*Increased access to communications technologies, in particular broadband, and the services and content carried on ICT networks, is acknowledged as an important means of promoting growth*".[2]

1.4 Section 6.3.1 of the ICT Policy White Paper Document provides, among other things in relation to competition, that ICASA must adhere to national policy goals.

1.5 Pursuant to the ICT Policy White Paper Document, ICASA carried out a priority market study in 2017 and identified mobile services as a market for further investigation under section 67 of the Electronic Communications Act, 2005 (ECA).

1.6 The process outlined in section 67 when conducting market inquiries requires ICASA to:

1.6.1 identify and define relevant markets in the provision of mobile broadband services;

1.6.2 determine the effectiveness of competition in the relevant markets;

1.6.3 determine licensees with significant market power; and

1.6.4 identify suitable pro-competitive remedies where competition is found to be ineffective.

1.7 ICASA has carefully set out its process in relation to each of these requirements and proposed remedies are largely consistent with those referred to in section 67.

1.8 There is established precedent for the carrying out of a market inquiry in that ICASA has reviewed the call termination market on 3 occasions to determine whether or not and to what degree the market structure has changed, and how prices to the consumer are affected. ICASA has also commenced a review of the subscription television service market and in that process, adopted the same approach.

1.9 The preliminary findings of ICASA as set out in the Discussion Document, are aimed at achieving national policy goals.

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[1] Paragraph 2.1 of the ICT Policy Document.
[2] Paragraph 2.1 of the ICT Policy Document.

2 Process followed by ICASA: Market definition

2.1 Market definition involves a number of tests, usually in supply, demand and geographic markets. In addition, ICASA's inquiry also focused on whether market entry would be likely, timely and sufficient to constrain any anti-competitive effects in identified markets.

2.2 To assess the closeness of competition between different products/services ICASA assessed whether consumers perceived them to be close substitutes in that they could substitute one with a competing alternative in response to an increase in price or reduction in the quality of a good or service.

2.2.1 The exercise therefore involved a demand-side analysis although ICASA noted that a supply-side analysis would also be necessary at some point in the process.

2.2.2 ICASA also considered whether one product/service could constrain another even if they were not substitutable.

2.3 ICASA's 2010 Guidelines for Conducting Market Reviews (Guidelines) formed the basis of the 2010, 2014 and 2017 reviews of the call termination market. ICASA consistently applied the tests set out in that document in those inquiries. Chapter 3.2 of the Guidelines deals with market definition. The approach taken by ICASA in the current inquiry is also consistent with the Guidelines.

2.4 We note that the Guidelines also use the 'barriers to entry' considerations to define a market, however we consider the steps to be relatively interchangeable at the early stage of the process. ICASA has used the 'barriers to entry' analysis in assessing the effectiveness of competition in a defined market. This is in keeping with international best practise and ICASA's approach in the call termination market inquiry.

2.5 Furthermore, the approach taken by ICASA in the Guidelines and in practise is equally consistent with international best practise. There is no one 'silver bullet' in the definition of a market, various tests may be appropriate. However, the key is to have a reasonable set of rules and to apply them consistently as this will ensure regulatory certainty and a robust process.

Answer to question 1: Cell C considers the approach to market definition to be satisfactory and appropriate.

Effectiveness of competition

2.6 To determine the effectiveness of competition ICASA used an internationally sound economic definition of barriers to entry i.e. the sunk costs of entry (costs that are not

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recoverable in the event of exit), the profitability of entry, and whether or not entry barriers are predetermined or strategic in nature.

2.6.1 Important concepts in relation to predetermined barriers to entry are minimum efficient scale ("MES") and minimum viable scale ("MVS"). Without MES a licensee is not able to garner market share because it is not gaining economies to allow it to reduce price and attract subscribers. MVS means the point at which an operator can be financially viable – it must be able to cover its costs and make a reasonable return.

2.6.2 Availability and the terms on which spectrum, site access and roaming are offered are a likely barrier to entry, alongside legal barriers e.g. IECNS licensing must be supported by the Minister. Without access to land and spectrum, a licensee cannot build out a mobile network. These are resources that are state-controlled.

2.6.3 However, despite the fact that both Telkom Mobile and Cell C have access to these resources, their ability to leverage them to advance their market position has been limited by other operators, and particularly those that already have access to sites and land that they are not willing to share, or share on terms that are not cost-related. In addition, roaming agreements that Cell C has been able to conclude with MTN and Vodacom have not been concluded from a position of strength – Cell C's negotiating power by virtue of its need to achieve national coverage and to avoid high capital expenditure as a result of its poor financial position, is limited.

2.6.4 ICASA notes that there are high switching barriers and costs e.g. (i) number portability is poorly executed and (ii) marketing and distribution costs are high – both can be manipulated by dominant operators to their own benefit and to the detriment of competition. Cell C has observed these phenomena itself and noted these matters to ICASA and the Commission on numerous occasions. The skewed market structure speaks for itself. Our submissions to ICASA are clearly supportive of this finding.

2.6.5 Finally, ICASA has noted at paragraph 64 that voice and data services are "ineffectively competitive". Cell C agrees entirely with this finding. The market structure – comprising 2 operators which together hold more than 80% of revenue in the market – is indicative of the absence of real competition at either the wholesale or retail level.

2.7 In the ICASA Guidelines, ICASA notes that effective competition exists when:

2.7.1 consumers have sufficient choice regarding who provides the services they seek, at reasonable prices;

2.7.2 sellers have access to buyers without justified restrictions imposed by external parties, including competitors and legislation;

2.7.3 the price charged for a product or service is a result of the interplay between consumers and licensees, i.e. no one firm has price-setting power; and

2.7.4 any variation in price in products or services is a result of differences in the cost of provision or characteristics inherent to the product, such as quality.

2.8 Cell C has provided ICASA with substantial and detailed data to support its contentions that this is not the case in the sector at present and has not been the case for many years. Competition is therefore ineffective.

2.9 Nonetheless, Cell C believes it would be helpful to include more examples of the types of barrier to entry that new entrants and small operators come up against so that there can be no doubt as to the state of the competition in the market. The Guidelines also include other types of barriers that are entirely relevant to the current inquiry. In the South African mobile broadband market these barriers are:

2.9.1 the large sunk costs of network deployment (gained in part by the first-mover advantage of each of Telkom, MTN and Vodacom) which do not accrue to smaller operators like Cell C and Telkom Mobile;

2.9.2 economies of scale and scope which are entrenched by network effects – the effect of on-net discounts and subsidies encourages the growth of clubs on the large networks, which results in a (not so) virtuous circle because unit costs per subscriber are effectively reduced;

2.9.3 the presence of high fixed costs which allow licensees with access to essential facilities or which have rolled out national networks to dictate the terms on which third parties can access those facilities and networks, maintaining the bottleneck for those parties;

2.9.4 ease of access to capital – in this market with the economic risks associated with a capital-intensive business, access to capital on favourable terms is key. A large operator with an established business and a high market share is more likely to attract funding than a small, struggling operator;

2.9.5 a history of collusion between the large operators;

2.9.6 a lack of countervailing buying power (as evidenced in the initial and subsequent national roaming agreements and interconnection agreements that Cell C and Telkom Mobile have had to enter into, largely on terms dictated by the providers e.g. the Cell C national roaming floor payment due to Vodacom coupled with the lengthy term); and

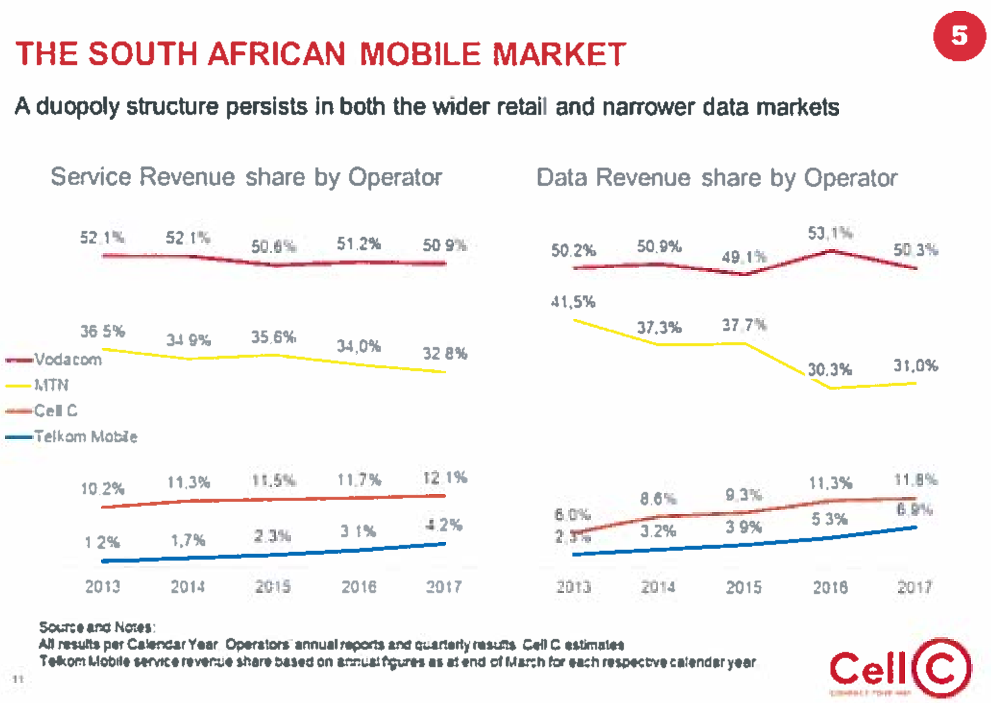
2.9.7 money to spend on subscriber acquisition and marketing initiatives to drown out the voice of smaller competitors, coupled with attractive discounts and promotions that a large operator can afford.

Market share

2.10 The determination of market share is related to the determination as to whether or not competition is effective. In determining market share, ICASA's analysis resulted in the conclusion that 2 operators have more than 75% of the total number of subscribers in this market, and the HHI is greater than 2000 which (on any measure) reflects a highly concentrated market across most municipalities. This has been the case for many years so is unlikely to change in the short to medium term. ICASA's typical horizon for a forward-looking market analysis is between 3 to 5 years.

2.11 Despite the upcoming auction process which ICASA has proposed following a Ministerial policy direction, the market is unlikely to change considerably in this period. The spectrum lots are yet to be defined, the reserve price determined, and the possible applicants are not yet known. Even when these issues are clear, the timing of the availability of 700 and 800MHz spectrum is likely to be delayed while digital migration is completed. None of these factors can therefore be said to have a material impact on market structure or market share in the relevant time horizon.

2.12 Cell C presented the following slide in October 2018 at the Competition Commission hearings on high data prices. The share of market is slightly different in the graph presented as Figure 4 in the Discussion Document, but in general, the position and conclusion are the same:



2.13 ICASA therefore correctly considered the relative <u>market shares</u> of the various licensees in the markets or market segments and took a forward-looking assessment of the likely relative market power of the licensees in the markets or market segments in the near term (regardless of the possible outcome of, for example, the spectrum auction).

2.14 In addition to an assessment of market shares, ICASA also undertook an assessment of dominance of operators in the defined market. A typical assessment of market power or dominance would consider among other things, whether or not one or more licensees have control of essential facilities, or a vertical relationship in a market at a fixed point in time, and then into the future.

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2.15 Although the Competition Commission Data Market Inquiry Report considers the control of essential facilities in great detail,[3] ICASA does not do this. In our view, it will be useful for ICASA to consider and agree with the Commission's assessment of this important feature of the market. This is because the definition of "market power" in the ECA includes the control by a licensee of essential facilities.[4]

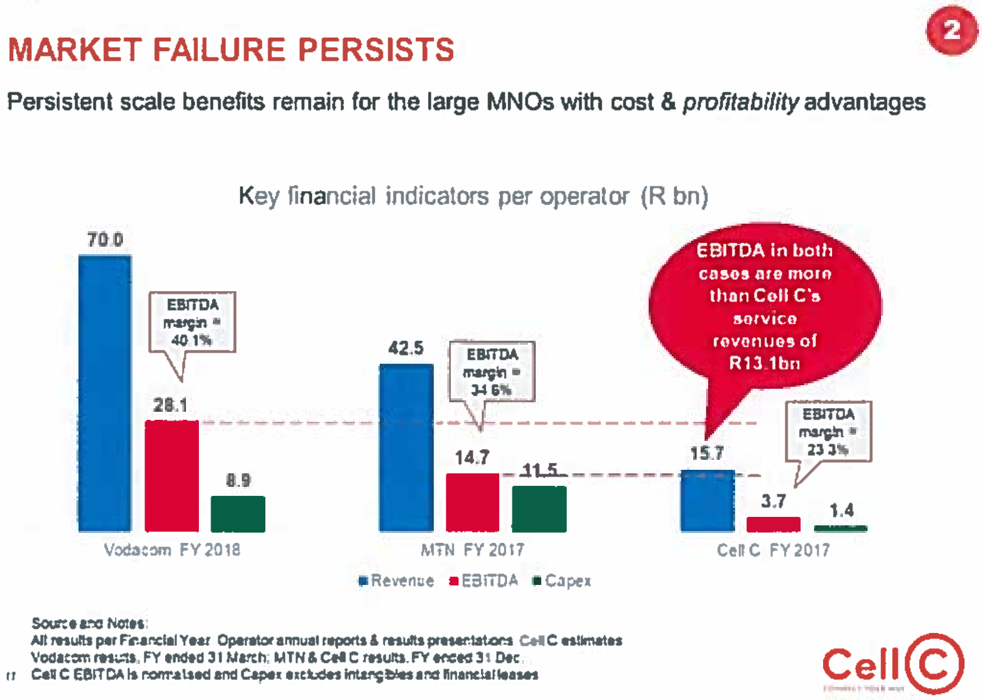
2.15.1 Cell C has indicated in its numerous submissions over the past 2 years, the types of facilities which could be considered to be "essential", and the licensees which control many of these facilities. For example, Telkom, MTN and Vodacom control backhaul from cable landing points and distributed antennae systems (DAS) to sites; and the same licensees also control many of the 'high sites' where their masts are located for best signal distribution.

2.15.2 The terms on which Cell C can access these facilities are not, we submit, based even notionally on actual cost. The terms on which access can be gained also generally involves an element of bundling e.g. backhaul plus DAS and when sharing sites with Telkom, all of Telkom's facilities and fibre must be used as well as taking space on masts.

2.15.3 We note that ICASA has yet to determine the list of essential facilities mandated under section 43 of the ECA and this would, in our view, be a 'quick win' in that it could take place in parallel with this process.

2.16 Finally, we note that the Competition Commission's report found unequivocally that the retail mobile market "has remained concentrated despite the entry of two challenger networks over time. Vodacom has a share in mobile services more generally, and data services specifically, that exceeds the thresholds used in the Competition Act for a conclusive determination of dominance. MTN has constantly skirted around the threshold level where there is a rebuttable presumption of dominance. These shares have barely changed over time, and even the most recent estimates confirm this scenario with the two incumbents collectively holding at least 80% of data revenue and 80% of total subscriber service revenue. The existence of market power and ineffective competition is also reflected in the profitability of Vodacom and MTN, both in absolute terms and relative to their operations in other markets." The effect of this stubbornly concentrated market where the two incumbents collectively hold more than 80% of key revenue market share indicators, is summarized in the following slide that Cell C presented in October 2018 at the Competition Commission hearings on high data prices:

[3] In particular, in chapter 6.7.2 of the Findings and Recommendations of the Commission, December 2019.
[4] Section 67(5)(b) of the ECA.



2.17 If ICASA and the Commission would liaise more closely on their respective findings, there would be even more support for the assessment conducted by ICASA and its own findings, particularly since at paragraph 27 of the Discussion Document, ICASA notes that it considers data services "in some detail".

> Answer to questions 2 and 3: Cell C supports the analysis of effectiveness of competition by ICASA but believes there are even more grounds and evidence on which one can rely for this conclusion, as set out above, and that liaison with the Commission would be valuable.

3 Additional commentary on markets identified and considered by ICASA

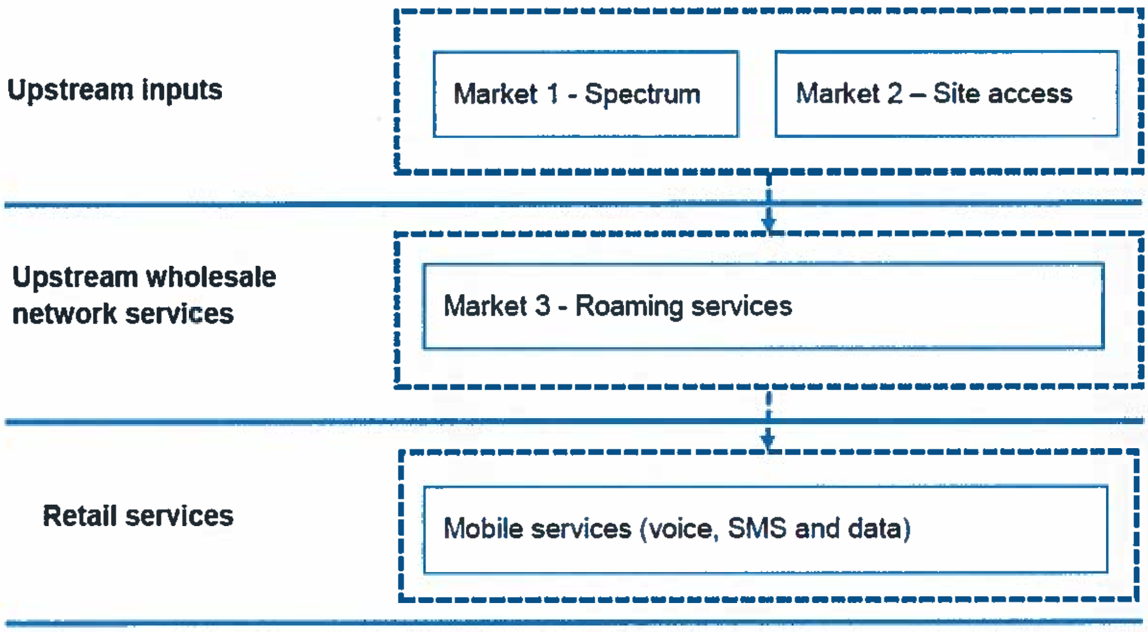
3.1 During the course of the priority markets identification process, ICASA found that there is a broad market for the <u>retail</u> supply of mobile services and the <u>wholesale</u> supply of mobile network services, including relevant facilities.

3.2 In August 2018 ICASA determined that it would consider the market for "mobile services" and that mobile broadband (mobile data services) are part of a suite of services offered by MNOs. These include voice, SMS, and data services as they require common inputs, including radio frequency spectrum and high sites (infrastructure-based competition – for wholesale services) or roaming or MVNO and APN services (services-based competition – for retail services).

3.3 In defining a relevant retail market, ICASA therefore aggregated voice, SMS and data as being provided by the same provider most of the time, with data being a complement rather than a substitute for voice and SMS[5]. It also concluded that "traditional voice and SMS services are therefore the main means of reaching a substantial proportion of consumers in South Africa, and this is likely to be the case in the short to medium term".

3.4 ICASA produced a value chain to illustrate its view of the market which we have reproduced below:

Figure 1: value chain



Answer to question 4: Cell C agrees with the aggregation of these markets for retail market analysis.

3.5 ICASA determined that the market could be segmented further by geography and customer. It noted that an assessment of market share also involves analyzing concentration in defined geographical markets. The ICASA analysis therefore takes the national and municipal markets into account to calculate market share and the effectiveness of competition.

3.6 ICASA observes that MTN and Vodacom are both vertically integrated since they operate downstream (in offering retail services) as well as upstream in offering wholesale services (having been assigned spectrum, operating their own high sites, and offering roaming services). The correlation between site market concentration and customer market concentration (measured by the HHI) is 0.46, suggesting a strong link between wholesale and retail concentration. ICASA also notes that the correlation between site market shares and customer market shares is 0.69, suggesting a strong positive link between wholesale and retail competition.

[5] Section 4.1.2 of the Discussion Document.

3.7 This degree of vertical integration is likely harmful to competition and gives rise to both operators having significant market power at the wholesale and retail levels. Evidence that the extent of vertical integration is harmful to competition is the limited sharing of infrastructure in South Africa and the very high costs of roaming and apparently high cost of site-sharing.

3.8 Cell C also notes ICASA's observation on tariff-mediated network effects, namely that "Differential charging for voice calls when they are off-net compared to when they are on-net means that consumers prefer larger networks in general, and networks that their friends, family and work colleagues belong to, in order to benefit from on-net discounts. This has the effect that 'clubs' of consumers are created which benefit dominant operators because of their proportionate increase in scale. Tariff-mediated network effects and switching costs in turn can result in significant advantages to being a first-mover in markets for mobile services, since once a customer is won, the customer is reluctant to leave. This suggests that voice services may play an important role in market outcomes where retail mobile services are concerned." ICASA may recall that Cell C submitted an extensive and detailed complaint to the Competition Commission in October 2013 regarding MTN and Vodacom's on-net off-net price discrimination. In its finding some years later, the Commission recommended that ICASA pursue the matter.

3.8.1 This practice by MTN and Vodacom continues today in the form of ongoing discounts and promotions, and cheaper on-net calls. Telkom is also offering on-net discounts in both fixed and mobile services.

3.8.2 No action was ever taken and 7 years later, the damage has been done. In our submissions to ICASA and the Commission, we noted that if this practice was prohibited by dominant operators, the benefits to non-dominant operators would be considerable – porting would be supported, price competition would be more effective, and perceived network benefits of the club could be utilized by smaller operators.

Answer to question 5: Cell C agrees with the analysis of retail mobile services. In particular, Cell C agrees with the statement by ICASA at paragraph 75 that "In fact, Vodacom and MTN's dominant positions in wholesale site access services are strongly correlated with their dominant positions at the retail level." Access to sites, as demonstrated in the information submitted to ICASA, has been an ongoing barrier to Cell C's network expansion because of the prohibitive cost to duplicate facilities when sharing sites on reasonable terms would enable substantial cost-savings. In addition, high national roaming costs (with minimum spend payments, high unit costs, no automated technology path upgrades available, i.e. from 3G to 4G, and a lack of quality because seamless handover is not made available) has compounded the prohibitive cost problem and has resulted in high input costs in these geographic areas, with a national effect on market shares, efficient scale levels and profitability figures. This has entrenched the market failure as there have previously not been any specific pro-competitive remedies to address these in the past.

4 Inputs to the relevant market

4.1 ICASA considers various inputs to retail services (i.e. upstream inputs) such as spectrum (from section 5.1) and finds that:

4.1.1 There is no substitute for spectrum;

4.1.2 It is a barrier to entry (as it requires a licence);

4.1.3 All operators have broadly similar allocations (Telkom has the most);

4.1.4 Contiguous spectrum could be substitutable; and

4.1.5 The market is effectively competitive however the lack of spectrum has a knock-on effect on licensees' ability to improve QOS and speed.

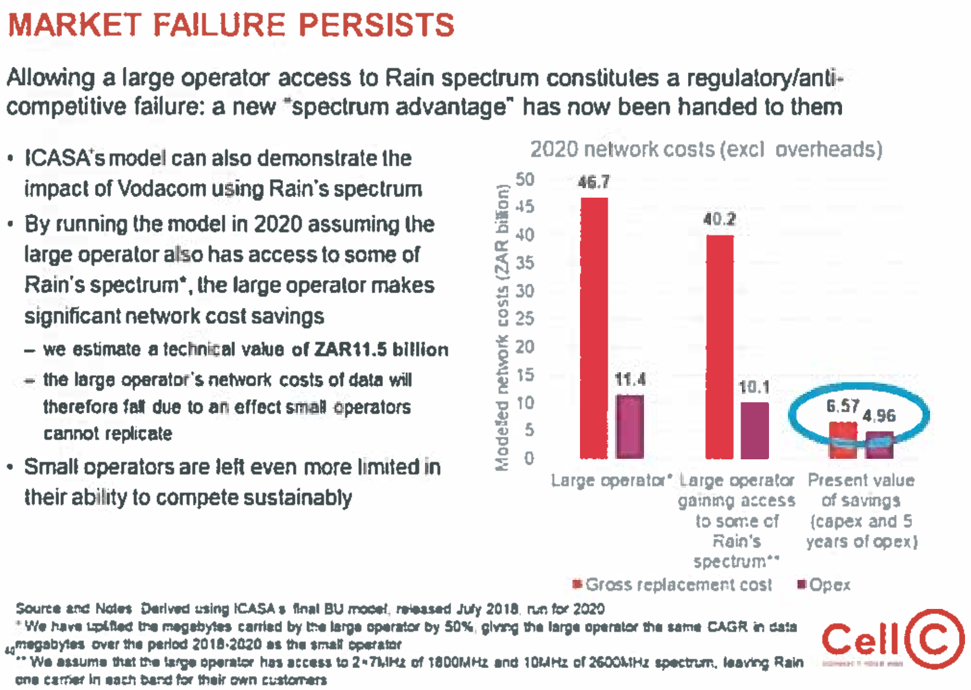
4.2 There is no mention of 5G by ICASA, and this is correct as this is a review of the current market and 5G will not necessarily affect competition in the near term despite the pending auction, as this has yet to take place and there are a number of issues still to be determined. In addition, South Africa still lags other countries in rolling out 4G networks.

4.3 [redacted]

[redacted]

Source: Cell C

4.4 With regards to the financial effects of these transactions, Cell C presented the following slide in October 2018 at the Competition Commission hearings on high data prices to illustrate the estimated cost benefits Vodacom derived from their Rain/Vodacom transaction.



4.5 We also note that it appears that Rain has additional spectrum in the 3600-3800MHz band which has not previously been publicised.

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Answer to question 6: Despite the initial broadly equivalent assignments for mobile operators, there are major differences in ability to use spectrum because of the number of spectrum transactions as explained above, including the financial constraints on small operators because they lack scale and the substantial financial benefits the large operators will derive from each of these transactions. These financial constraints mean that rolling out national networks to optimally use spectrum is extremely difficult. Assessing spectrum on its own is therefore, in our view, not useful unless ICASA turns its attention to the number of ostensible spectrum/roaming transactions that have recently taken place.

4.6 Section 6.1.2 considers site access as an input. Cell C wholeheartedly supports the content and conclusions reached in this section. Cell C also agrees that national roaming is not a sufficient substitute for site access, despite many of the benefits that national roaming may confer. Ultimately it is expensive and difficult to manage in that the provider is in control of its own network and determines how and in what manner it will service the roaming operator.

4.7 Licensees place great emphasis on the varied and frustrating processes imposed by municipalities in order to gain access to land, Cell C included. However, we implore ICASA to liaise with the Minister as a matter of urgency to give effect to the requirements of Chapter 4 of the ECA and the rapid deployment chapter of the ICT Policy Document. The Minister has the ability to urge other relevant departments to co-ordinate their activities in order to promote infrastructure build. The provisions of the Infrastructure Development Act, 2014, have set out the processes to be followed for critical infrastructure, including electronic communications.

4.8 COGTA and SALGA also have a role to play here – a true 'whole of government' approach to site and land access is required to enable national deployment of broadband services on reasonable prices without unreasonable delays.

4.9 Cell C supports the findings set out in section 6.2.2 on site access and terms on which this is provided to licensees by other licensees. We note that Vodacom is dominant in 104 municipalities by itself, MTN is dominant in 18 by itself, and MTN and Vodacom are both dominant in 2 municipalities. Telkom is dominant in 11 municipalities. Their market shares in this area are simply impossible to match or compete against. Cell C is not aware of the site-sharing transactions that ICASA refers to in paragraph 117 but would be interested to know which licensees are involved and which sites are affected.

Answer to question 7: Cell C supports ICASA's findings on site access as a necessary input to the provision of services.

4.10 Cell C notes with interest the analysis of national roaming set out by ICASA in section 7. While Cell C contributed a significant amount of information to ICASA in this regard in support of our contention that roaming is not a competitive activity, Cell C is interested in ICASA's observation that "The provision of national roaming depends on capacity". Ostensibly MTN and Vodacom are roaming on Liquid Telecom (and Vodacom on Rain) i.e. a dominant operator is roaming on a non-dominant operator. Since Rain and Liquid Telecom do not have national networks, roaming only makes sense if it is to gain capacity. However, the benefits of gaining capacity on networks with limited geographical footprints are not clear.

4.11 Cell C's view, as expressed to ICASA, is that capacity-constrained licensees like MTN and Vodacom are in fact gaining access to third party spectrum to produce the capacity they need, while 'roaming' on these small networks. Vodacom has expressed its arrangements with Rain as being 'open access' but Cell C has asked for access to the Rain network on numerous occasions and been refused each time. Vodacom, meanwhile, is building out a radio network for Rain, capable of deploying 4G (and even 5G, based on recent press reports).

4.12 The statement by ICASA that "At present, sites in rural areas often only have coverage by MTN and Vodacom. As such, there is in effect a duopoly in the provision of roaming services in particular geographic locations[6]" may not be true. National roaming is a duopoly, that much is clear, and it is not untrue to say that roaming may be a site-based activity, however to identify these sites from the information presented to ICASA and regulate this activity at that level, is unlikely to be possible given that accounting separation and price regulation is more pragmatic at a total national area level than on a per geographical location area. ICASA has determined that all 234 municipalities have an HHI of above 2000 (for site ownership), and are therefore highly concentrated.[7] More importantly, if any national roaming remedies are not imposed on the total national roaming traffic, then such remedies will not capture all national roaming traffic (i.e. only on a subset of the total national roaming traffic like a number of geographical areas only) and hence the effect of such remedies will not be large enough to address the historic and current market failure in the national roaming market. Also, and as important, as small mobile operators need national coverage to compete on a national basis to derive scale benefits that will assist them to be sustainable competitors in the long run, national roaming is an important and critical cost input into the wider retail market and any national roaming remedy on all national roaming traffic will assist to address the market failure in the wider retail market. Finally, national roaming services are also an important service to MVNOs and therefore will assist MVNOs to have a national coverage footprint and to stay relevant in the market. It is therefore appropriate to regulate the total national roaming traffic and given its effect on the wider retail market and on the MVNO market, introducing national roaming price regulation is likely to address the lack of any historical pro-competitive national roaming remedies to date and ensure tangible pro-competitive remedies going forward that will assist smaller operators and allow for a more sustainable WOAN in the future.

4.13 As we have shown ICASA in various models, the cost of roaming is above true cost and in Cell C's case the cost of data roaming is higher than its average effective retail rates. ICASA has agreed with this statement in paragraph 169. However, ICASA's statement that in future there is likely to be more competition on price and terms of national roaming (or any roaming) is not borne out by the facts and by any evidence presented. Historically Cell C's roaming agreement with Vodacom was extremely difficult to amend, even after the regulation of call termination rates. Amending the roaming agreement with MTN has also been difficult, particularly given Cell C's financial constraints. There is no basis in this sector at all to support a market-led change in roaming conditions in the near term when the market is, on ICASA's own version, highly concentrated.

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[6] Paragraph 160 of the Discussion Document.
[7] Paragraph 164 of the Discussion Document.

Answer to question 8: Cell C supports much of ICASA's analysis and their findings in relation to roaming but is concerned that ICASA has suggested no price regulated remedies. We will address remedies specifically later in this submission. Our concern in relation to roaming is that site-based regulation is not warranted, and the market is unlikely to be able to alter the balance of power in the provision of roaming in the short term.

MVNOs and APN

4.14 Cell C is at a loss to understand why ICASA needed to investigate a 'market' for MVNOs. The number of resellers in this market is small and the impact of their presence on the retail market is minimal. There is no competition problem in this market either – it is simply a case of MTN and Vodacom being unwilling to host MVNOs on reasonable terms. There is also no legal or factual basis on which ICASA can rely to designate Cell C as having 'market power' as Cell C is actually an enabler of competition in the wider retail market by offering other entities access to that market. Our economic and legal arguments in this regard were advanced to ICASA on several occasions.

4.15 Cell C has been a market disruptor and challenger operator since launch. As the first network to host MVNOs, it has led service-based competition in South Africa. Addressing the provision of wholesale capacity to MVNOs is not an area which should be considered to be a priority, particularly given that the provision of MVNO services assists Cell C in its efforts to obtain scale benefits in a highly concentrated market and also given Cell C's current financial difficulties.

4.16 ICASA has also proposed to include obligations on successful bidders in the High Demand Spectrum auction to host MVNOs in the Draft Information Memorandum on the licensing of High Demand Spectrum. Cell C has provided comments on these proposals submitted to ICASA separately, however, it is Cell C's view that this Discussion Document addresses the issue appropriately and is therefore supported.

Answer to question 9: As indicated Cell C does not consider it necessary to review MVNO services in the context of this market inquiry as some of the mobile operators refuse to supply MVNO services.

5 Remedies proposed

5.1 The concentration in retail mobile services identified by ICASA suggests that remedies affecting retail voice service, such as mobile termination rate regulation and number portability continue to be important interventions in the market for mobile services which must be maintained. ICASA has already taken many positive steps to regulate call termination rates since 2010, arguably the most positive of which for Cell C has been the 2017 determination. Unfortunately, despite this further intervention, the market continues to exhibit high concentration and Cell C's market share has not grown owing to these and other regulatory related factors.

5.2 As we mention in paragraphs 2.9 and 3.8 above, a complaint made by Cell C to the Competition Commission in 2013 was eventually referred back to ICASA by the Commission for further investigation. The complaint concerned the on-net off-net price differentiation perpetuated by the dominant operators in the market. Tariff-mediated network effects entrenched the 'club effect', embedding subscribers to dominant operator networks on those networks because of lower pricing for on-net calls than for off-net calls, and ongoing promotions and discounts. We strongly recommend that ICASA take this into account in the remainder of the inquiry, particularly insofar as remedies are concerned. For ICASA's reference, the remedy proposed for inclusion in the suite of remedies considered by the Communications Authority in Kenya, in relation to a finding of this kind of practise by the dominant operator, Safaricom, stated: "*Safaricom should not be permitted to charge different rates for on-net and off-net calls or messaging to any customers under any circumstances (i.e. through its standard tariffs, promotions or permanent loyalty schemes). This includes a requirement that any bonus airtime granted to Safaricom customers should be usable for on-net and off-net calls and messaging at the same rates. To ensure that customers are aware of this remedy, all Safaricom advertising marketing materials referring to tariffs, promotions and customer loyalty schemes should make it clear that on-net and off-net tariffs are the same and that bonus airtime may be used for on-net and off-net calls and messaging.*"

5.3 ICASA itself proposes to redraft the facilities-leasing regulations to include detailed guidelines which will address the timing of responses to requests, extent of sharing, and impose obligations on dominant operators to reserve space on sites for third parties. ICASA also proposes to implement an obligation to create accounting separation would enable ICASA to inspect charges relative to cost.

5.3.1 Cell C has already suggested that ICASA can achieve a 'quick win' by publishing a regulation on essential facilities, and defining these facilities to include as many necessary or integral facilities for sharing purposes, as well as the facilities that are controlled only by dominant operators, as "essential".

5.3.2 Cell C does not believe it is necessary to publish new regulations dealing with facilities leasing, since this process could be extended unnecessarily. An amendment to the existing regulations to include detailed guidelines and revisit existing deadlines for negotiation and terms will be adequate. It is the implementation of the regulations that makes all the difference. Reference access offers should also be published by dominant operators, setting out the facilities that they hold, which are available, the terms on which they are available, and the price. These must be published for consultation and ultimately, for approval by ICASA. Recent literature from other countries indicates how important this aspect is for the promotion of adequate competition both in networks and services.[8]

5.4 We also propose that – as ICASA has already suggested this in the Information Memorandum – it add to the suite of remedies proposed, a recommendation to regulate the terms on which national roaming is provided by dominant operators to

[8] See https://www.frontier-economics.com/uk/en/news-and-articles/articles/article-i6960-stalked-by-the-cat/?utm_source

new entrants and smaller non-dominant operators. ICASA can do this within the licence conditions of the licences to be awarded pursuant to the allocation of high demand spectrum, but a supportive regulatory process such as this inquiry, will add to the weight of such a remedy and likely increase confidence of investors in the spectrum assignment process. A remedy of this sort was recommended to the Kenyan Communications Authority pursuant to an investigation into the dominance of Safaricom in 2017. The remedy was phrased as follows: "*For a period of five years, Safaricom should provide 2G, 3G and 4G roaming on its network to other Tier 1 mobile operators in the counties identified for regulated tower sharing*[9]*. The national roaming offer should be based on the LRAIC of an efficient operator, providing coverage in the area designated for national roaming with a quality of service equivalent to that which Safaricom provides to its own subscribers. Safaricom should prepare a RAO detailing the commercial and technical aspects of its national roaming offer.*" Some changes would obviously be required to reflect the South African situation as to technology and geography.

5.5 More importantly, if any national roaming remedies are not imposed on the total national roaming traffic, then such remedies will not capture all national roaming traffic (i.e. only on a subset of the total national roaming traffic like a number of geographical areas only) and hence the effect of such remedies will not be large enough to address the historic and current market failure in the national roaming market. Also, and as important, as small mobile operators need national coverage to compete on a national basis to derive scale benefits that will assist them to be sustainable competitors in the long run, national roaming is an important and critical cost input into the wider retail market and any national roaming remedy on all national roaming traffic will assist to address the market failure in the wider retail market.

5.6 The findings in the report are supported in that they are based on material data assessed during the inquiry; and that;

5.6.1 they are in line with the only other market inquiry undertaken by ICASA, namely the call termination rate inquiry (and Guidelines issued in 2010);

5.6.2 they are in line with the requirements of section 67 of the ECA;

5.6.3 they have been based on operator data submitted to ICASA during the process.

5.7 There are numerous findings of dominance to support remedies being imposed by ICASA only on MTN and Vodacom, but they are likely to challenge the findings and remedies, despite the fact that the remedies are the least onerous that ICASA could impose at this point. We note that prior to the publication of the final Facilities Leasing Regulations in 2010, ICASA consulted on similar regulations for almost 7 years. During this period, ICASA suggested introducing accounting separation and the filing of regulatory accounts. We submit that had these proposals been adopted,

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[9] At paragraph 7.4.2 of the Discussion Document ICASA considers the areas in which MTN and Vodacom are dominant for roaming. Paragraph 188 of the Document makes similar findings to those identified in Kenya.

they would have had a pro-competitive effect on the market and likely reduced the cost of sharing and leasing earlier.

5.8 However, despite our support for the process and these findings (including proposed remedies, we are concerned that ICASA's findings are not entirely in sync with those of the Commission; and operators are likely to use one set of findings against the other, and attempt to confuse the issues arising in each (separate) inquiry.

6 Conclusion and next steps

6.1 Cell C supports the findings of, and process followed by ICASA in the broadband mobile market inquiry (other than as expressed in relation to MVNOs). We have made suggestions as to where these findings could be amplified and where potential remedies could be reviewed and strengthened in the previous section.

6.2 Our final observation is that in a substantial part of the Discussion Document, ICASA examines the market for mobile data within the mobile services market. This is interesting and useful, but again, would be more persuasive if it could be aligned with the Competition Commission's findings, and any differences in the approach and conclusions explained by ICASA.

6.2.1 For example, the Commission's mandate is an ex post mandate, whereas ICASA has an ex ante regulatory mandate. This primary distinction is important when considering ICASA's goal. Not only must it examine the market as they stand, but it must undertake a forward-looking analysis in order to propose proportionate remedies for current and likely future market failures. The Commission's inquiry was focussed on a perceived harm that already exists in one market, namely that of the provision of mobile data services.

6.2.2 A further example of the differences in approach is apparent from the fact that the Commission also asked for and received a significant amount of information from licensees, but it was requested in a format that served the purpose of the Commission's inquiry. Much of the data was presented in such a way as to demonstrate the underlying cost of data services as well as factors influencing the provision of data services to consumers in differently priced bundles consisting of differently constructed amounts of data to be used over varying lengths of time. While ICASA asked for a substantial amount of information from licensees, some of which was the same as that provided to the Commission, its interest in the information was to assess market shares and the effectiveness of competition in the defined markets. Price regulation is part of ICASA's mandate, but only as a remedy in the event of a failed market (ineffective competition) where other remedies will probably not have the optimal outcome.

6.3 To avoid any challenge by licensees to the Discussion Document and the next steps that ICASA must take i.e. to formulate appropriate and proportionate remedies, ICASA and the Competition Commission must seek to distinguish their inquiries and findings from one another on relevant legal and factual grounds.

6.4 Cell C looks forward to engaging with ICASA on this process and is available for any questions that ICASA might have.

6.5 Cell C understands that the next step in the process is for ICASA to make a final determination regarding the appropriate and proportionate remedies to apply.

6.6 Cell C would like to participate in any oral hearings that ICASA may decide to hold.