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Attention: Ms V Molete and Ms P Cokie

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12 March 2019

Dear Madam

**CELL C LTD'S RESPONSE TO ICASA CONSULTATION ON AMENDMENTS TO THE  
SPORTS REGULATIONS**

Cell C Limited (Cell C) is pleased to provide its response to the draft amendments to the Sports Broadcasting Services Regulations, *Gazette* 33079 of 7 April 2010 (the Amendment to the Sports Regulations). Cell C has launched an online platform or OTT called **black**. **black** provides a menu of content available to subscribers or on a once-off basis, which includes sport. However **black** has not been able to acquire the rights to license or directly purchase rights from rights holders to local and international sports because of the fact that Multichoice has either sewn up these rights for lengthy periods of time, or because Multichoice has the ability and does in fact outbid any competitor for these rights which it acquires and holds on an exclusive basis. Cell C, through **black**, has a vested interest in the outcome of this consultation.

## Introduction

1. Cell C notes that these Amendments have been published at a time when ICASA is undertaking an inquiry into subscription broadcasting services, with a view to assessing the level of market power and/or market failure in this market and determining a remedy or suite of remedies.
  2. The market power that Multichoice Pty Ltd (Multichoice) holds in this market and its market segments, such as the acquisition and retailing of premium local and international sports content, suggests that it would be appropriate to formulate amendments to these important Sports Regulations as part of the suite of remedies to be imposed should ICASA determine that there has been market failure and that Multichoice is indeed dominant in this market and in these market segments. ICASA will recall that Cell C submitted that the relevant markets for purposes of the inquiry are the acquisition and distribution of premium sports content which includes both international and local sports events.
  3. However, in the interests of achieving several of the objects of the ECA, and specifically the promotion of competition in the broadcasting sector, Cell C supports the efforts by ICASA to ensure wider access to sports events and by extension, access by various distribution channels and not only pay tv in the form of Multichoice's SuperSport and DSTv bouquets. As early as 2010, ICASA recognised that gaining access to and the availability of local and international sports events is in the public interest, and at that time, attempted to ensure that the public (free to air or FTA) broadcaster, SABC, was able to broadcast events in which a national sports team was featured.
  4. Unfortunately, the high prices that Multichoice has been prepared to pay to rights holders has effectively excluded the acquisition by any other broadcaster or platform, of this content. In addition, Multichoice's practise of acquiring all rights across the distribution value chain including streaming, delayed broadcasts, and mobile broadcasting, whether or not these rights were or are actually exercised by it, has also precluded alternative platforms from acquiring other rights to the same events. This practise is known as "squatting" or "hoarding". It has the effect of sterilising competition from any other source – because no other content provider can access or distribute the same rights. In other words, to watch international or local sports, one must have a Multichoice decoder and subscription. In fact, for access to premium sports, one must have a Premium bouquet –
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which is the most expensive package available from Multichoice, at almost R950.00 – which is unaffordable for the majority of the population.

5. It is clear from the numerous presentations made to ICASA during the course of the subscription television broadcasting market inquiry (which is ongoing) that Multichoice is dominant on any measure one applies.
6. In this submission, Cell C sets out:
  - a. General comments on the international treatment of sports broadcasting rights; and
  - b. Specific comments on the Amendments.

In Cell C's view, the Amendments require further consideration as they will play a critical role in both the promotion of competition in distribution of sports events to viewers, and in fostering the public interest in high quality sports content. Cell C recommends that the Amendments are made in the context of the inquiry by ICASA into Multichoice's dominant position in the market. A separate submission has been made to ICASA in this regard.

#### **General comments on the international treatment of sports broadcasting rights**

7. There are generally accepted to be two key issues arising in the consideration of the regulation of television sports broadcasting. These are recognised by ICASA as "reaching a wider audience and to strike a balance between audience and revenue". In other countries including Australia, Brazil, Italy, India, the UK and the USA, the principles are referred to as "economic and socio-cultural". Similarly, in these countries and in South Africa, the regulatory authorities have concluded that the commercial interests of pay tv broadcasters and rights holders have over time, taken precedence over the public interest in viewing national and international sports events, particularly where national teams are participating.
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8. In an article entitled "The Regulation of Television Sports Broadcasting: A Comparative Analysis"<sup>1</sup>, the authors advise that policy makers and regulatory bodies should resist pressure from pay tv broadcasters and/or sports organisations to undermine or remove all sports broadcasting regulation and address the market power of sports channel owners and/or broadcast delivery platforms through the application of competition law. They recognise, however, that striking a balance between a free market society and strong regulation is difficult.
  
9. Pay tv has certainly extended the range of sports now available for viewing by introducing coverage of sports not previously shown on FTA television or providing more extensive coverage of existing sports events available on FTA, providing significant benefits for viewers and sports organisations<sup>2</sup>, and arguably advertisers. However, this is still regarded as – particularly in the last few years – less valuable than the wider public interest. In the EU, the Audio-Visual Media Services Directive (2010/13/EU) is intended to "*lay[s] down framework conditions to prevent major events from being monopolised by pay-TV. This framework enables Member States to ensure that broadcasters under its jurisdiction do not broadcast events of major importance for society on an exclusive basis, as it would deprive the possibility for a majority of the public to follow them*".
  
10. Article 14 authorises each State within the EU to "*take measures in accordance with Union law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events by live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due time. In so doing the Member State concerned shall also determine whether these events should be available by whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.*"

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<sup>1</sup> Smith, P, Evens, T, and Iosifidis, P. (2015) The regulation of television sports broadcasting: a comparative analysis. *Media, Culture and Society* 37(5): 720-736.

<sup>2</sup> p723 *ibid*.

11. One of the remedies permitted to Member States in the case where a broadcaster obtains exclusive rights, is to "*establish an equivalent system which achieves access on a fair, reasonable and non-discriminatory basis through other means.*"
12. Revisions to this Directive that were adopted in November 2018 have not amended Article 14.
13. In the international arena, consideration has been given to whether the rights holders are acting as a cartel in that they are selling rights in terms of 'collective selling agreements'. Cell C has not considered this aspect as ICASA is not authorised to intervene in this regard, as this is the province of the Competition Commission. However, it may be advisable for ICASA to liaise with the Commission prior to finalising the Amendments (if ICASA is minded to go ahead with these Amendments in this process).
14. What is more interesting and potentially more useful to ICASA, is the notion that exclusive live sports programming could be considered to be an essential facility.<sup>3</sup> In terms of this doctrine, the upstream rights to broadcast acquire sports coverage are essential for downstream providers (such as **black**) to compete in the relevant market i.e. sports broadcasting, and cannot easily be replicated without raising costs. This could potentially mean that the terms on which those rights are made available must be fair, reasonable and non-discriminatory. Currently the notion of "essential facilities" in South Africa is limited to facilities, but this may also be an area in which the Commission and ICASA could collaborate.
15. The regulation of the terms on which rights to distribute sports events across different platforms are equally as important as the obligation to make them available. It will serve little purpose if Multichoice is obliged under the Amendments (if these are passed without challenge) to make rights available to third parties, but it can set its own terms. The terms are quite likely to be such that they factually exclude third parties from acquiring them because they are priced excessively or so high as to be unaffordable. As a matter of fact, although the Regulations require Multichoice to make live sports events available to SABC, it does not stipulate that SABC must be able to broadcast the events

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<sup>3</sup> p724 ibid

live – and SABC has been obliged by Multichoice to broadcast sports events on a delayed basis as a result.

16. In Australia, FTA broadcasters have been given a 'first choice' in relation to sports rights and the regulatory authority prevents pay tv broadcasters from acquiring sports rights on an exclusive basis, referred to as "anti-siphoning laws"<sup>4</sup>. In addition, the list of events to which this regulation applies is very extensive, covering 1800 events in 2015<sup>5</sup>. However, even in Australia as recently as January 2019, commentators criticised the manner in which pay tv is still able to gain access to live sport to the detriment of FTA channels simply because of their deeper pockets (resulting in consortia of FTA channels and other small pay tv channels buying the rights together).<sup>6</sup>
17. In India competition authorities have been quick to rule that the cricket Board of Control (the rightsholders)<sup>7</sup> abused their dominant position in the award of commercial contracts, and fined that body. However, the matter has become more complicated with additional restrictions on sub-licensing of local sports broadcasting rights being upheld by national courts in India.<sup>8</sup>
18. In summary, the approach to sports broadcasting rights in India is that the actions of local sports rights holders will be scrutinised by competition authorities, leaving broadcasters free to compete against one another.<sup>9</sup> The Competition Commission of India has put it this way, "*...the mere fact that some of the rules of the sporting organisations have a restrictive impact on mobility of players or freedom of competition would not make those rules violative of principles of competition law. The test would be to assess whether "the restraint on competition is a necessary requirement to serve the development of sport or preserve its integrity"*".

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<sup>4</sup> <https://www.acma.gov.au/Industry/Broadcast/Television/TV-content-regulation/sport-anti-siphoning-tv-content-regulation-acma>

<sup>5</sup> The latest list can be found at <https://www.legislation.gov.au/Details/F2017C00987>

<sup>6</sup> <https://www.theroar.com.au/2019/01/10/sports-broadcasting-in-australia-reaches-crisis-point/>

<sup>7</sup> The Board of Cricket Control of India (BCCI), the sole association regulating cricket and this multi-million dollar industry, given cricket's massive popularity in this country.

<sup>8</sup> <https://www.india.com/sports/cricket-broadcasting-rights-in-india-sc-upholds-hc-verdict-2420928/>

<sup>9</sup> [https://www.lawinsport.com/topics/sports/badminton/item/how-competition-law-is-affecting-sports-in-india-a-look-at-the-emerging-case-law?category\\_id=177](https://www.lawinsport.com/topics/sports/badminton/item/how-competition-law-is-affecting-sports-in-india-a-look-at-the-emerging-case-law?category_id=177)

19. Other countries such as Italy have been criticized for a less well-developed or regulated regime in relation to the licensing and sale of sports broadcasting rights.
20. It seems that ICASA has drawn some of the proposals in the Amendments, such as the introduction of Group A and Group B rights, from the UK model. However, the thinking that has gone into the development of the UK model and the supporting legislation and rules that exist in the UK to clarify and explain the rationale for this model, have been omitted by ICASA, which may render the proposals open to challenge. We discuss this in more detail in the next section.

### **Specific comments on the Amendments**

21. The Amendments proposed by ICASA appear to follow the approach adopted by the EU and the UK, as indicated above. However, there are a number of areas in which ICASA has not recognised the flaws in the EU approach which have been remedied by the EU or at least, subjected to greater scrutiny and more explanation – but these remedies have not been adopted by ICASA in its drafting. We will explain why we say this below. Furthermore, ICASA has the opportunity to improve existing drafting within the Regulations, which it has not taken.

### **22. Regulation 1:**

- a. ICASA has not included all the names of the ruling federations of sports in South Africa. Either all the names should be included or ICASA should merely use the general definition of “confederation sporting event” to include national federations.
  - b. The definition of “delayed live” should be amended. Delay could constitute a matter of minutes. The word “halfway” should be deleted. When considering live sport, any delay is likely to reduce the attraction of the content since watching live as it happens, is of the essence of this content.
  - c. The definition of “dispute” is substantive. This is not appropriate for a definition. The last part of the definition which starts “...and in respect of which mediation...” to the end should be deleted. In addition, the definition of “dispute” should include a dispute concerning the application or interpretation of these
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Amendments and the Regulation (for example, a dispute may arise in relation to the definition of “Minority Sports” since this definition could be subjectively interpreted).

- d. The definition of “National Sporting Events” is not adequate in that it could be subjectively interpreted. It is unclear who will ‘deem’ a sport to fall within this category. We recommend that ICASA have regard to the 4 criteria used by the EU in making a determination about the importance of a sporting event or the application of regulation to the broadcasting of it (bearing in mind that at least 2 of these criteria must apply to indicate the importance of the event to society).

These are:

- i. A special resonance [within the Member State] and not simply a significance to those who ordinarily follow the sport or activity concerned;
- ii. A generally recognised, distinct cultural importance for the population [in the Member State] in particular as a catalyst of cultural identity;
- iii. Involvement of the national team in the event concerned in the context of a competition or tournament of international importance; or
- iv. The fact that the event has traditionally been broadcasting on FTA television and has commanded large audiences.

- e. The same could be said for the definition of “Sports of National Interest”. It will be important to have some measure against which the “appeal to the majority of the South African populace” can be assessed.

- f. We recommend that all definitions included that are already in the ECA or Broadcasting Act, 1999, be adopted to avoid confusion and disputes regarding interpretation. These are “subscription broadcasting service licensee” and “free to air broadcasting service licensee”.

- g. We recommend that ICASA insert a definition of “the Commission” with reference to the Competition Commission. In our view, ICASA should liaise with the Commission to determine which matters concerning in particular, sports rights holders, might be referred to the Commission for investigation.
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23. Regulation 2: the provisions of (d) might be improved by use of the language of “economic and socio-cultural importance”.
24. Regulation 4: see our comments above in 21(d). Cell C recommends that additional and more certain criteria be included here when ICASA determines whether a sporting event is of public interest. Furthermore, it is unclear why the list should be limited to national sports events. It is clear from international and local research that several international sporting events are of public interest to South Africans. These should not be excluded by virtue of the fact that ICASA has limited the wording of this regulation to “national sporting events”. This being the case, the Australian approach may also be instructive, namely to include opening and closing ceremonies, and the all matches in which a national team features within an international competition, not just the semi-final and final. Alternatively, regulation 4(a) needs to make it clear that the entire confederation sporting event will be of public interest.
25. Regulation 5:
- a. Regulation 5.1.1. uses the words “must be broadcast on full live coverage on FTA”.
    - i. This is unclear – does ICASA mean that every FTA licensee must acquire the event or does ICASA intend this to mean that every such event must first be offered to FTA licensees before a pay tv broadcaster can acquire that event?
    - ii. In addition, the acquisition of an event does not always mean that it is broadcast. As indicated in the introduction, pay tv broadcasters such as Multichoice often hoard or squat on a series of rights without using them. ICASA cannot oblige an FTA broadcaster who cannot afford the rights offered by a rights holder, to acquire them.
    - iii. Cell C recommends that ICASA withdraw the Amendments in order to strengthen and clarify what is meant here, perhaps with reference to the UK provisions.
  - b. Regulation 5.1.2 provides that if the FTA licensee “cannot acquire the rights” then it must inform pay tv broadcasters to allow them to bid for the rights on a non-
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exclusive basis. This provision should be split into several clauses to ensure that the various parts of it that constitute obligations are clear.

- i. When must the FTA licensee decide that it cannot acquire the rights?
  - ii. What if the reason that it cannot acquire the rights is that the pay tv broadcaster has already acquired them? Regulation 5.1.1 does not prohibit the acquisition of these rights by a pay tv broadcaster as we have shown above.
  - iii. When must the FTA licensee inform the pay tv, and how? In writing? What if there is a closing date for bids to be submitted to rights holders – how does ICASA intend the obligations to work in this case?
  - iv. ICASA has not actually prohibited the acquisition of rights by pay tv broadcasters on an exclusive basis. The way that this provision is worded, ICASA is describing a situation where those rights have not been acquired exclusively, but what ICASA intends to do (we assume) is to prohibit the pay tv broadcaster from acquiring them exclusively. This clause must be rewritten to ensure that it contains the prohibition, or it will have no effect.
  - v. Similarly, the word “offered” in relation to non-exclusive rights excludes the possibility that the rights holder does not offer the rights on a non-exclusive basis, but only exclusively. The way in which the clause is worded would mean that the requirement to sub-license does not apply. We assume that this is not what ICASA intended. The clause must be reworded to reflect ICASA’s intention which must surely be to oblige any person who obtains the rights on a non-exclusive basis, to sub-license those rights on request. It may in this case, also be appropriate to require licensees that wish to acquire rights from rights holders to seek those rights on a non-exclusive basis at all times. This would tend to exclude the possibility that Multichoice might ask to take rights on an exclusive basis for a premium – with the result that the rights holder is incentivised to make those rights available on an exclusive basis (whereas previously it may have offered them on a non-exclusive basis).
  - vi. Cell C is concerned that what is required from entities such as Multichoice by entities that wish to offer an alternative form of distribution, such as **black**, is that the commercial terms on which Multichoice makes any such content that it is able to acquire are fair, reasonable and non-discriminatory. However, under the current ECA regime, it is not legally possible for ICASA to regulate the terms of a commercial arrangement
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unless (1) the content is included in the definition of an “essential facility” (see paragraph 13 above), or (2) ICASA has found Multichoice to be dominant in the relevant market and applies a suite of remedies including terms and conditions on which access to this content must be provided. ICASA has not finalised its market inquiry into pay tv broadcasting, so the second option is not available currently. However, it is these terms that may well prove to be the most important part of the Regulations if ICASA’s intention is to protect the public interest and promote competition.

- vii. Finally, on this point, please could ICASA clarify if its intention is to regulate the take up of rights on a non-exclusive basis where the rights are to events in Group A and B? If so, then it would be appropriate and necessary to state this.
- c. In regulation 5.2 Cell C suggests that ICASA include the FIFA Confederations Cup here as it is possible that South Africa may participate in future.
- d. There are significant and additional concerns with the drafting of regulation 5.2:
- i. What is the difference between Group A and Group B sports as far as obligations on pay tv broadcasters are concerned? The wording of regulation 5.2. is entirely unclear. Can a Group B event be acquired by a pay tv broadcaster? Is this intended to be the case only if the FTA licensee cannot acquire it?
  - ii. Why is sub-licensing referred to? This would be a commercial matter. If ICASA wishes to oblige all pay tv licensees to sub-license their rights to certain sports events to FTA licensees, then this must be phrased as an obligation. The same is true for the reference to “non-exclusive” for the same reasons as set out in (b) above. An obligation must be phrased positively and definitely, not as an adjective in a sentence.
  - iii. Cell C recommends that events in Group B should specifically be stated to be available only on a non-exclusive basis.
  - iv. There are several useful international precedents that can be used to describe national and international tournaments so that reference to a sponsor is not required. We understand the concern here – that perhaps a sponsor’s name change will allow a pay tv licensees to escape the net
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of this obligation, but Cell C is willing to assist in coming up with other descriptors for these events to prevent this from happening.

- e. Regulation 5.3 contains a Group C list of sports.
  - i. We note that Indigenous Games are not defined. We recommend that this be defined to avoid disputes regarding interpretation.
  - ii. Although Cell C appreciates the inclusion of many of these sports – some of which such as golf and water polo – have a significant following, the provisions of regulation 5.3.2. undermine what we believe ICASA's intention to be. This is because the regulation appears to oblige FTA and pay tv broadcasters to broadcast events of at least 2 of the sporting codes (which term is not defined) per annum. The broadcasts do not appear to have to be current and there are no restrictions on broadcasting old events several times. We presume that ICASA intends to require the broadcasting of these sports in the same year that they take place, and without reruns of previous years' events. We also make the point that rights to golf, for example, are likely to be expensive. This may mean that golf does not ever receive coverage even if South Africans are playing in this sport in a local or international event. This is at odds with ICASA's stated intention of regulating events of national interest.
  - iii. Finally, we recommend that these events should all be subject to a requirement that they are acquired on a non-exclusive basis. It is quite likely that more than one platform might wish to acquire the same rights and it should be open to it to do so, in the interests of promoting competition.

26. Regulation 6: there are several concerns with this regulation that are similar to our concerns with regulation 5.1.

- a. The existing provisions of regulation 6(1) of the Regulations have been omitted. We do not understand why ICASA would omit this obligation. This obligation should stand regardless of whether or not ICASA introduces any other provisions in this regulation because it is through this mechanism and obligation that pay tv broadcasters may sub-license content to other distribution platforms.
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- b. ICASA uses the words “acquired or failed to acquire” in regulation 6.1. If a broadcaster has no interest in acquiring a sports event, must this broadcaster also advise other licensees that it has no interest in acquiring that or those events?
  - c. In the previous section on regulation 5 we make the point that there is a potential timing issue. If a bid situation has a closing date, the notification process may have no utility if notification takes place after the closing date. We recommend that ICASA have regard to the process used in other countries alternatively restrict the acquisition of certain Group sports to FTA broadcasters, or further alternatively, oblige any broadcaster who acquires those rights to sub-license them. The contractual arrangement for sub-licensing will have to be given more thought, because of the limitation on ICASA’s authority in relation to commercial matters.
  - d. The reference to “delayed live” or “delayed” does not include any time limit. As we indicated in relation to the definition of “delayed live” in regulation 1, any delay at all should be considered to be a delay. Live sport is by its nature, desirable and important because it is live. A delay even of minutes could affect the level of competition between two different platforms offering that same event.
  - e. We are uncertain why regulation 6.4. is required at all?
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## 27. Regulation 7:

- a. Although it is perhaps obvious that it is only ICASA that may add to the Groups, Cell C recommends that this clause be rephrased to refer specifically to Groups and not “a list” and to ICASA, as the only entity that may amend a Group.
- b. Any application under regulation 7(1)(b) should be published by ICASA for comment in the usual course. We recommend that (c) be amended to refer to section 4B of the ICASA Act in relation to process.
- c. It is unclear why ICASA has included (d). Has ICASA consulted with these bodies prior to publishing the Amendments? If the requirement is in primary law then there is no need to repeat it.
- d. The provisions of (e) appear to be incomplete.

## 28. Regulation 8:

- a. The reference to alternative dispute resolution is not consistent with the national law. The ECA provides that disputes must be resolved by ICASA or the CCC. It is unclear why another type of dispute resolution is introduced in the Regulations and retained in the Amendments. Presently the provisions of regulation 8(4) only refer to the CCC in relation to non-compliance with an obligation to include an alternative dispute resolution process in any agreement between broadcasters. This is not legally correct.
  - b. Cell C recommends that sub-regulations (1),(2) and (3) be deleted and sub-regulation (4) be amended to require that all disputes be referred to the CCC (or ICASA).
  - c. As a result, Cell C recommends that references to regulation 8(1) and 8(2) in the new (3A) and (4) be omitted.
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- d. However, we believe this would also be an appropriate place to introduce a reference to the Commission. In the event that ICASA determines that a rights holder or a rights holder in conjunction with a licensee, is deliberately providing bundled rights or refuses to unbundle distribution rights so that they can be acquired singly or as selected by an acquiring entity, then this should constitute grounds to refer the rights holder and/or the licensee to the Commission. In addition, the sale of rights by a rights holder or the acquisition of rights by a licensee on an exclusive basis should also constitute grounds to refer that entity to the Commission, except where the exclusive sale is not disputed by any other entity or where the rights are to sports events within Group C. Cell C is willing to provide suitable drafting options for ICASA in this regard.

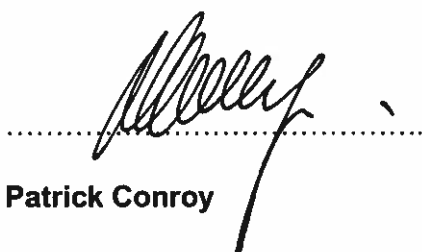
We trust that these submissions are helpful, although we reiterate our concern that the Amendments would be better situated within the context of remedies in the course of the section 67 inquiry that ICASA is undertaking into Multichoice's dominance. Cell C wishes to participate in any oral hearings that may be held.

Yours faithfully



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