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22 November 2013

Dr Stephen Mncube
Chairperson
ICASA
Block B, Pinmill Farm
164 Katherine Street
Sandton

Via Email : Chairperson@icasa.org.za

Attention : Christian Mhlanga
Via Email : CMhlanga@icasa.org.za

Dear Sir,

RE: DRAFT CALL TERMINATION REGULATIONS (GOVERNMENT GAZETTE NO. 36919 PUBLISHED ON 11 OCTOBER 2013)

MTN would like to thank the Authority for the opportunity to make comments on the draft Call Termination Regulations, as published in Government Notice 1018 of 2013. We submit herewith our comments for your consideration.

Please note that the MTN claims confidentiality in terms of Section 4D (1)(a) of the ICASA Act with respect to a) Paragraphs 2.1, 3.3.6, 3.3.8, 4.4, and 5.2 b) pages 36, 39, 40 and 50 of Appendix A (numbering as per "confidential" version) c) Appendix B d) Appendix D and may not be disclosed or divulged to any person as this information is in terms of Section 4D(4) financial and commercial information, "the disclosure of which is likely to cause harm to the commercial or financial interests of such person". Moreover the information relates to business plans of MTN, a licensee as envisaged in Section 4D(4)(e).

To this end, MTN has prepared two versions of its submission, clearly marked “Confidential Version” and “Public Version”, only the latter may be shared by ICASA with the public.

Furthermore, MTN records that it wishes to make oral presentations to the Authority should oral hearings be scheduled.

Thanking you in anticipation.

Yours faithfully,

GRAHAM DE VRIES
ACTING CHIEF CORPORATE SERVICES OFFICER
MTN (PTY) LTD

PUBLIC VERSION

MTN'S RESPONSE TO THE ICASA DRAFT CALL TERMINATION REGULATION AS PUBLISHED IN GOVERNMENT GAZETTE NO 36919 DATED 11 OCTOBER 2013

November 2013

Please note that the MTN claims confidentiality in terms of Section 4D (1)(a) of the ICASA Act with respect to a) Paragraphs 2.1, 3.3.6, 3.3.8, 4.4, 4.4.4.5 and 5.2 b) pages 36, 39, 40 and 50 of Appendix A (numbering as per "confidential" version) c) Appendix B d) Appendix D. This information may not be disclosed or divulged to any person as this information is in terms of Section 4D(4) commercial information, "the disclosure of which is likely to cause harm to the commercial or financial interests of such person". This information may not be disclosed or divulged to any person whatsoever in any form or manner whatsoever, either directly or indirectly, without the express prior written consent of MTN and all measures possible must be implemented to ensure that any employees, officers, agents, contractors and sub-contractors, representatives, consultants to whom the confidential information is disclosed do not divulge the information to any third party. The confidential Information may only be used for internal purposes and processes relating to the finalisation of the Call Termination Regulation and may not be used for any other purpose whatsoever.

1 Introduction

1.1 MTN (Pty) Limited ("MTN") would like to thank the Independent Communications Authority of South Africa ("ICASA") for the opportunity to respond to the draft Call Termination Regulations as published in GN 1018 of 11 October 2013 ("the Draft Regulations") in terms of the Electronic Communications Act, No. 36 of 2005 ("the ECA"). MTN's submission will deal with the following topics:

1.1.1 Legal submissions.

1.1.2 Regulatory and economic submissions.

1.1.3 Public policy submissions.

1.1.4 Appendix A makes detailed comments on the Draft regulations and highlights key areas of departures from the 2010 Call Termination Regulations.

1.1.5 Appendix B provides data support for MTN's proposed arguments.

1.1.6 Appendix C provides a view of European regulatory best practice on asymmetry.

1.1.7 Appendix D contains MTN's presentation to ICASA on 7.11.2013 (one on one meeting)

2. Legal Submissions

2.1 The Draft Regulations represent a ***[confidential]*** for MTN over the next three years, plus a ***[confidential]*** competitive subsidy to Cell C over the regulatory period. Given this substantial financial and competitive impact, MTN submits that the time period for comments (30 days) and the amount of engagement (a single, 90 minute one–on-one meeting for "clarification purposes") for the consultative process are procedurally unfair.

2.2 Moreover, MTN has not been exposed to any of the cost modelling or cost-benefit analysis used by the Authority to derive its target termination rates and the proposed asymmetry levels. In the result, MTN cannot meaningfully engage with the Authority on the parameters that so significantly impact its business plan going forward. MTN submit that this is also procedurally unfair.

2.3 The Draft Regulations represent a substantial departure from the 2010 Call Termination Regulations. The 2010 Regulations set an important regulatory precedent in relation to matters such as cost-orientation for rate-setting, managed glide path, and declining asymmetries. Any departure from these principles would have to be thoroughly explained and fully motivated by the Authority. Remarkably, however, the Draft Regulations provide no explanation, no cost-modelling evidence and no analysis to explain the 75% reduction in the rates set by the Authority in 2010, the reversal of the asymmetry glide path or the 375% increase in asymmetry value proposed from 1 March 2014. The significant departure from the 2010 Call Termination Regulations (see appendix A), coupled with the lack of any proper explanation for this change of stance, renders the Draft Regulations irrational and unreasonable.

2.4 MTN's detailed submissions regarding the Draft Regulations are set out in Appendix A below. For present purposes, we merely draw attention to the following by way of overview.

2.5 Regulation 3(a) of the Draft Regulations defines Market 1 as "the market for wholesale voice call termination services to a mobile location on the network of each ECS/ECNS licensee who offers such a service within the Republic". It is apparent from this definition that the Authority has taken the view that each licensee offering call termination services has a 100% market share in its call termination market. However, a different position is taken elsewhere in the Draft Regulations. For example, paragraph 2.2 of Appendix A provides that "a licensee qualifies … for an asymmetric rate if it has less than 20 per cent of total terminated minutes <u>in the relevant market</u> as of December 2012". Since the Authority has already taken the view that each licensee has a 100% market share in its call termination market, it is difficult to see how a licensee can have a market share of less than 20%.

2.6 Regulation 7(1)(a) of the Draft Regulations provides that the Authority has determined "inefficient pricing" as a cause of market failure in the wholesale voice call termination market. However, the pricing that has applied in the market for the past three years has been the pricing prescribed by the Authority in the 2010 Call Termination Regulations. If the Authority is of the view that this regime has produced market failure in the form of "inefficient pricing", then it makes little sense for the Authority to perpetuate such market failure in the form of the Draft Regulations.

2.7 Regulation 7(5)(a) of the Draft Regulations obliges MTN to charge the wholesale voice call termination rates specified in Table 1. MTN makes the following submissions regarding Table 1:

2.7.1 Paragraph 1.1 of Appendix A provides that "for the purposes of regulation 7(2)(a), 'fair and reasonable' prices are rates that are equivalent to the cost-oriented rates imposed on the licensees identified in Regulation 7(4)".

2.7.2 The rates in Table 1 therefore purport to be "cost-oriented".

2.7.3 MTN has requested the Authority to furnish it with the data and cost-modelling on which it presumably relied in order to determine that the rates in Table 1 are "cost-oriented". The Authority has declined to do so. MTN reiterates its request for this data. In the absence of such data, MTN is unable to interrogate the Authority's claim that the rates in Table 1 are "cost-oriented".

2.7.4 The only justification that is offered for the rates in Table 1, is contained in paragraph 5.3 of the Explanatory Note to the Draft Regulations which states that "the Authority determines that the cost of termination in Market 1 is now approximately R0.10 per minute based on, amongst others, the increase in traffic on licensees' networks". This provides a wholly inadequate basis for the Authority's conclusion that the cost of termination in Market 1 is now "approximately" 10 cents per minute. For example, what investment has the Authority assumed MTN made to support the above traffic growth on its network?

2.7.5 Regulation 7(5)(c) of the 2010 Call Termination Regulations required the licensees identified in regulation 7(4) to "submit regulatory financial reports in line with the format prescribed in the Accounting Separation and Cost Accounting Regulations to be prescribed by the Authority". However, the Authority has failed to prescribe the Accounting Separation and Cost Accounting Regulations envisaged by Regulation 7(5)(c). In the result, the Authority could not have been in possession of any accounting data allowing it to determine that the cost of termination in Market 1 is now "approximately" 10 cents per minute. When MTN updates old regulatory models with more recent investment data, the cost estimates it derives are substantially different from the rates proposed by the Authority. This further highlights the need to closely interrogate the cost modelling performed and rates proposed by the Authority.

2.7.6 Regulation 7(5)(b)(iv) of the Draft Regulations provides that the Authority "will amend existing rates [i.e. the rates in Table 1] if shown to be necessary, based on the outcomes of this model [i.e. the bottom-up LRIC cost model]". Since the rates in Table 1 purport to be "cost-oriented", it makes little sense for the Authority to say that it will amend those rates if the bottom-up LRIC cost model reveals that they are *not* cost-oriented after all. The Authority is required to determine that the rates in Table 1 are cost-oriented *before* it makes the Draft Regulations, not *after* it has done so. To date, MTN has not been furnished with any data indicating the basis on which the Authority has determined that the rates in Table 1 are "cost-oriented".

2.8 In order to undertake a review of the pro-competitive conditions imposed upon one or more licensees, the Authority must follow the process described in section 67(8) of the ECA. The Draft Regulations fail to do so. Instead, the Draft Regulations and Explanatory Note appear to mirror the 2010 Regulations in structure and approach (definition of the relevant markets, competitive assessment, SMP determination, pro-competitive terms and conditions). They read as if the Authority were starting its market analysis afresh in terms of section 67(4) of the ECA, rather than reviewing its existing findings in terms of section 67(8).

2.9 Section 67(8)(c)provides: "*Where, on the basis of such review, the Authority determines that the licensee to whom pro-competitive conditions apply continues to possess significant market power in that market or market segment, but due to changes in the competitive nature of such market or market segment the pro-competitive conditions are no longer proportional in accordance with subsection (7), the Authority must modify the applicable pro-competitive conditions applied to that licensee* ***<u>to ensure proportionality</u>****.*"[our emphasis]

2.10 The Authority must therefore show that the dynamics in Market 1 have deteriorated to such an extent that the new, substantially more onerous remedies imposed on MTN are proportionate. It is apparent the Authority has not done this—indeed it is difficult to see how it could do so in a market where each licensee is said to have 100% market share. Even in relation to the wider retail mobile market, indicators and commentators suggest the mobile market has become *more* competitive since 2010. The Draft Regulations will nevertheless impose more onerous pro-competitive remedies imposed on MTN. This is disproportionate and inconsistent with section 67(8)(c) of the ECA.

2.11 In the 2010 Call Termination Regulations, the Authority determined four market failures: lack of access; discrimination; lack of transparency and inefficient pricing. However, the 2013 Draft Regulations identify a single market failure: inefficient pricing. This indicates that ICASA has formed the view that competition has become more effective in the past three years. However, the Draft Regulations fly in the face of this by imposing more onerous pro-competitive conditions on MTN. We submit that this does not comply with the requirement of proportionality in section 67(8)(c) of the ECA.

2.12 Paragraph 2 of Appendix A to the Draft Regulations provides that "a licensee must justify why it is adversely affected by current spectrum allocation", and that it may "qualify" for asymmetry in certain circumstances. It is not apparent from paragraph 2 to who the licensee must "justify" its spectrum deficiency or who will decide whether the licensee "qualifies" for asymmetry. This renders much of paragraph 2 unworkable.

2.13 Regulation 8 of the 2010 Call Termination Regulations states that a review of the call termination markets will take place *"<u>after a minimum period of</u> three (3) years from the publication of these regulations" [our emphasis]*. This indicates that a review in terms of Regulation 8 could only start on 29 October 2013. However, the Draft Call Termination was published on 11 October 2013. ICASA is therefore acting in a manner that is inconsistent with Regulation 8 of the 2010 Call Termination Regulations.

2.14 The regulatory, economic and policy arguments highlighted below indicate, in our submission, that the Authority has not properly applied its mind to the Draft Regulations. The Explanatory Note substantiates the rationale for the Draft Regulations in a manner that is inadequate and insufficient. In the absence of detailed cost data and cost modelling information from the Authority, the proposed rates can only be assessed by reference to benchmarking. Benchmark analysis reveals that the proposed rates and asymmetry are not supported by global and regional best practice nor relevant cost models (see Appendix C and B7). The Draft Regulations do not appear to consider any impact analysis. In particular, no attempt has been made to consider the proposal's financial impact on MTN and the various other stakeholders to assess their proportionality (as required by section 67(8)(c) of the ECA).

2.15 For all of these reasons, MTN submits that the Draft Regulations in general, and the proposed termination rates in particular, are irrational and unreasonable.

3. Regulatory and economic submissions

3.1 The Authority finds that competition is ineffective in Markets 1 and 2, and justifies its continued imposition of pro-competitive remedies on the basis of a single market failure in the voice call termination market, namely *inefficient pricing (see* draft regulation 5 and 7.1.a). This finding is bizarre given that pricing in these markets has been regulated by the Authority since March 2011. Against this background, it is incumbent on the Authority to now show why the Draft Regulations will not create further inefficient pricing conditions in Markets 1 and 2. The Authority has made no attempt to do so.

3.2 The Authority provides no empirical basis for the new cost-oriented rates in Market 1 (nor the unchanged rates in Market 2). Notwithstanding its requests, MTN has not been provided with any insight into the methodology used by the Authority to compute its new cost-oriented rates, or the input cost data used to arrive at the 10c target. In this regard, MTN notes the following:

3.2.1 No cost data has been filed with the Authority by MTN since its last COA/CAM submission (2008) was used to set the target rate of 40c in the 2010 Regulations;

3.2.2 The Call Termination Questionnaire (GG 36532) focused on retail and termination traffic or revenues. This cannot provide the basis for a cost study (no cost information was requested or provided, and no cost data could possibly have been inferred from MTN's response);

3.2.3 MTN has invested many billions of Rands in capex in its voice network since 2010 in order to cater for voice coverage and capacity improvements. Any cost-oriented rate must take account of this incremental investment. It is not clear how the Authority could have done so;

3.2.4 The proposed 10c target rate is not justifiable on the basis of global or regional benchmarking (see appendix B1).

3.2.5 In particular, the proposed 10c rate is substantially lower than the rates derived (using the cost standard proposed by ICASA in terms of Regulation 5.b) in other regional jurisdictions: Tanzanian (17c target in 2017) and Nigerian (24c target in 2015) mobile termination rates were both determined on the basis of a PwC BU-LRIC model. See Appendix B2.

3.3 The Authority provides no basis for the reversal in asymmetry trends set out in the 2010 Regulations, the unprecedented asymmetry value proposed in Market 1 (19c in 2014), or the continuation of asymmetry for another five years. See Table 1 below.

Table 1: MTR asymmetries in Market 1 (Rand/ minute, unless otherwise stated)

	MTN MTR	Asymmetric MTR	Asymmetry value	Asymmetry %
Mar-11	0.73	0.88	0.15	20%
Mar-12	0.56	0.64	0.08	15%
Mar-13	0.40	0.44	0.04	10%
Mar-14	0.20	0.39	0.19	95%
Mar-15	0.15	0.33	0.18	120%
Mar-16	0.10	0.26	0.16	160%
Mar-17	n/a	0.20	n/a	n/a%
Mar-18	n/a	0.14	n/a	n/a%
Mar-19	n/a	0.10	n/a	n/a%

2010 Regulations

2013 draft Regulations

3.3.1 The continuation of asymmetry for another five years, its potential application to Cell C (a player that has been in the market for 12 years and has close to 20% market share – see Appendix B8) and the 375% increase in asymmetry levels, from 4c to 19c on 1 March 2014 would amount to a world first, and would run contrary to international best practice (see Appendix C). MTN submits that such a departure from ICASA's own precedents and international best practice must be thoroughly explained and justified by the Authority. To date, the Authority has offered no adequate justification at all.

3.3.2 The Authority made statements in the Explanatory Note accompanying the 2010 Regulations regarding the need for time- and value-limited asymmetries to ensure efficient investment, and maximize welfare. Paragraph 2.4.5 of the Explanatory Note to the 2010 Call Termination Regulations stated that "*the Authority determines that the application of asymmetric rates* ***for a transitory period*** *(own emphasis) will benefit total social welfare by stimulating competition in the respective markets, thereby benefitting end-users."* Furthermore, "*the Authority determines that it is necessary to* ***limit and reduce the amount of asymmetry*** *(own emphasis) a qualifying licensee may charge, to ensure that investment by new entrants is efficient*".

3.3.3 These 2010 statements were aligned with international best practice on asymmetry (see Appendix C). They were captured in ICASA's proposals through the reduction of asymmetry from 20%, to 15% and finally 10% over the three steps of the previous glide path. Given these statements and this trend, market players (including beneficiaries of asymmetry) could have reasonably expected (and planned for) an end, or at least a continued decline in asymmetry levels in any future glide path imposed by the Authority.

3.3.4 Now, the Draft Regulations radically overturn ICASA's own 2010 position. MTN submits that it is incumbent on the Authority to explain and justify why it has come to such a different conclusion about the impact and welfare value of asymmetries compared to its position in 2010, and why it is proposing to depart from international best practice. The Authority has not offered any explanation or justification for this about-turn.

3.3.5 Furthermore, Draft Regulation 7.2.a, read with paragraph 1.1. of Appendix A, suggests that the cost-orientation remedy applies to all licensees. The Authority must therefore demonstrate, through cost modelling, the growing cost difference (from 95% to 160%) between MTN and asymmetric players in Market 2 to justify its proposed level of asymmetry. The Draft Regulations make no attempt to do so.

3.3.6 No cost-benefit analysis is apparent in the Draft Regulations for the ***[confidential]*** competitive subsidy handed over to Cell C over the regulatory period (see asymmetry valuation analysis in appendix B3). In fact, the proposed asymmetry is by its very nature anti-competitive in nature.

3.3.7 Cell C reports that it is currently adding 1 million subscribers a month. Its CEO is boasting 33% subscriber growth over the last 18 months: "We have grown our base by 33% to 12.3 million customers in just 18 months*," Knott-Craig told delegates at the [MyBroadband 2013] conference"*[1]. Separately, when reporting its FY2013 results, Blue Label Telecom (a distributor of prepaid airtime for all four mobile operators) reported that Cell C had increased its prepaid revenue market share by two percentage points over the last 12 months, the only operator growing share in the period July 2012 to July 2013. See Appendix B4.

[1] Cell C subscriber growth soars, BusinessTech October 2013. http://businesstech.co.za/news/mobile/47428/cell-c-subscriber-growth-soars/

3.3.8 This substantial and profitable growth is taking place in a 4c asymmetry environment. In such circumstances, increasing Cell C's asymmetry by 375% to 19c/min on 1 March 2014 and providing it with a ***[confidential]*** regulatory subsidy over the next 5 years would represent a substantial competitive leg-up to an already fast-growing competitor. This regulatory value transfer would need to be supported by a robust cost model and an understanding of its investment and competitive implications for the South African mobile market, or risk being seen as irrational and unreasonable. To date, the Authority has offered no explanation for this at all.

3.3.9 MTN notes the proposed levels of asymmetry are substantially higher than those seen in a (declining) pool of asymmetric jurisdictions in Europe, averaging 4c (see appendix B5). The Authority must show why it considers that substantially higher levels of asymmetry are required and justifiable in South Africa. The Authority has made no attempt to do so. Even by Cell C's chosen benchmarks, the Authority's asymmetry proposals can be seen as being extreme (by reference to the size of the asymmetry, the market share thresholds for determining its recipient and / or its proposed duration). See Appendix B6.

3.4 Finally, MTN submits the Authority's proposals are logically wanting in the following respects:

3.4.1 Appendix A provides that a licensee may charge asymmetrical rates if (*a*) it is "adversely affected by current spectrum allocation" and (*b*) it has "less than 20 per cent of total terminated minutes in relevant market as of December 2012". As regards (*a*): MTN is unable to see how Cell C, Telkom or Neotel could demonstrate any spectrum disadvantage; on the contrary, they have benefited from spectrum asymmetries – see Appendix B8. As regards (*b*): by virtue of the Authority's market definition, every ECN or ECNS offering call termination services in South Africa has 100% market share in the relevant market. In the result, the asymmetry provisions cannot apply to any licensee in South Africa (fixed or mobile).

3.4.2 Asymmetry is being justified by the Authority on the basis of the smaller operators' lack of scale and scope. Yet, the Authority proposes that these licensees should continue to benefit from asymmetrical rates, even if they gain more than 20% of the total terminated mobile minutes during the glide-path period. There is no reason why licensees should continue to receive asymmetrical benefits if the basis for those benefits (i.e. lack of scale and scope) has ceased to exist. We submit that this is not "fair and reasonable".

3.4.3 MTN is unable to understand why the asymmetry thresholds (supposedly reflecting "efficient scale and scope") will change over time.

3.4.4 MTN is very concerned that eligibility for asymmetry is being determined on the basis of December 2012 market shares when the new termination rates will apply in March 2014 (a full 14 months later). This is especially relevant given that Cell C is experiencing substantial market share gains in 2013. Projecting Cell C's current growth rates suggests it may well have crossed the proposed "20% share threshold" (at least in retail subscriber terms) by 1 March 2014. See Appendix B8.

3.4.5 MTN is puzzled by the different glide path durations proposed by the Authority. The Authority is proposing to "lock" termination rates for a full six years for asymmetrical players in Market 1, but is only proposing to determine MTN's rates for 3 years, and subject to LRIC modelling outputs.

3.4.6 In terms of Draft Regulation 7(2)(a), all SMP licensees are required to charge fair and reasonable rates. Fair and reasonable rates are defined in Appendix A as "*rates that are* equivalent *to the cost oriented rates imposed on [MTN]"*. MTN cannot understand how the glide path enjoyed by asymmetrical players in Market 1 can differ in length from the glide path applied to MTN. By virtue of the "fair and reasonable" obligation, the two glide paths are inextricably linked, both in level and duration. This also means that the output of the BU-LRIC model proposed in Regulation 7(5) necessarily affects MTN and asymmetrical players equally.

3.4.7 Given the Authority's finding that *all* voice call termination markets suffer from "inefficient pricing", MTN is surprised the Authority is proposing to cut MTN's termination rates by 50% (from 40c to 20c) in 2014, while leaving asymmetrical rates in Market 1 at 39c (just 1c off the current "inefficient price"). Even more bizarre is the Authority's proposal to keep rates in Market 2 unchanged (i.e. at their supposedly "inefficient" level). The Draft Regulations appear to be enshrining, rather than removing the current market failures in Market 2, and for asymmetrical licensees in Market 1. This is irrational and unreasonable.

3.4.8 Generally, MTN is surprised by the Authority's radically different approach to remedies in Market 1 and Market 2 (which, according to the Draft Regulations, share exactly the same competitive characteristics):

3.4.8.1 MTN has already highlighted the bizarre conclusion that despite the finding of inefficient pricing in Market 2, rates in Market 2 are proposed to remain unchanged.

3.4.8.2 MTN is equally surprised by the different approach taken by the Authority regarding asymmetry in Markets 1 and 2. Appendix A suggests that asymmetries in Market 2 remain constant at 10% during three years. This contrasts with the substantially higher and variable levels of asymmetry proposed for Market 1 (up to 160% asymmetry). MTN cannot understand the rationale for the differences in how asymmetries appear to be calculated in Market 1 and 2. MTN submits that these different approaches are arbitrary and irrational.

3.4.8.3 The radically different approach to remedies in Markets 1 and 2 produces another bizarre result. MTN notes that the Authority is proposing to set rates in Market 1 (MTRs) below rates in Market 2 (FTRs) from 1 March 2015. The Authority's finding that terminating a call on a mobile network (with a traffic sensitive "last-mile") costs less than terminating a call on a fixed network (which copper "last-mile" is largely traffic insensitive) constitutes a first in the regulatory world. MTN submits that this finding cannot be justified on the basis of a rigorous, LRIC-based cost study. In Europe, where the EU Commission recommended that termination prices be set on the basis of LRIC for both fixed and mobile termination rates[2], the average MTR is 25c. The average FTR is 7c, suggesting substantial cost differences between mobile and fixed termination rates, on a LRIC basis. See appendix B9.

3.4.8.4 The GSMA published a detailed study (see Appendix E) on the reason for these cost differences. They "*conclude that there are* ***significant differences between the cost structures of mobile and fixed***

[2] Commission Recommendation and Commission Staff Working Document accompanying the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU. Explanatory Note {C(2009) 3359 final}, {SEC(2009) 599}

***operators**. The biggest single difference is the access network and how its costs are driven and hence should be recovered. The access network in a fixed network (predominantly the copper loops) is almost entirely driven by the number of subscribers […]. This is not the case for mobile networks where the access network (base stations and associated equipment) is not dedicated to individual subscribers. An increase in traffic on mobile networks does require further investment in the access network*"[3].

3.4.8.5 MTN respectfully requests the Authority to justify how its costing models delivered the counter-intuitive finding that mobile call termination costs less than fixed call termination. The Authority has provided no such justification.

[3] 1. Source: GSMA, Comparison of fixed and mobile cost structures,

4. Public Policy submissions

4.1 MTN has undertaken a detailed assessment of the likely impact of the Draft Regulations on MTN's business plan, on South African stakeholders, and on key policy objectives. This analysis was presented to the Authority on 7 November 2013, following the Authority's invitation to "share MTN's views on the implications of the proposed termination regulations on MTN's business in South Africa."

4.2 MTN dedicated significant resources towards researching and compiling a fact-based analysis of the impact of the 2010 glide path, and estimating the impact of the Draft Regulations on its business and South Africa, more generally. This was done with a view to assisting the Authority establish the proportionality of its proposals, by comparing the costs and likely consequences of its proposals, with the Authority's expected benefits from its intervention. To date, the latter remains unquantified by the Authority.

4.3 In the same way, MTN was invited to assess the impact of the proposals on its business, MTN requests a quantification of the Authority's expected benefits from its proposals, so that proportionality can be assessed in line with section 67(8)(c) of the ECA.

4.4 To avoid prolixity, MTN will only reproduce the key conclusions of its impact analysis below. The full presentation made to the Authority on 7 November can be found in Appendix D. In summary, MTN's key findings are:

4.4.1 [confidential]

4.4.2 [confidential]:

Table 3: ***[confidential]***

4.4.3 [confidential]

4.4.3.1 [confidential]

4.5 Given the policy implications of the above analysis, MTN again requests the Authority to set out the benefits expected from its proposals in a cost-benefit and proportionality analysis.

5 Conclusion

5.1 Past MTR cuts have had a dramatic impact on MTN. However, their impact was managed through business model realignment that was made possible by ICASA's managed glide path policy.

5.2 The Draft Regulations abandon this successful policy, and create a ***[confidential]*** "shock" to MTN's business that will impact on jobs, investment, Broadband for All targets and economic growth. This shock has already influenced investment decisions at MTN Group.

5.3 ICASA's radical proposals are misaligned with international best practice as well as any reasonable cost-based view, as highlighted through benchmarks.

5.4 In particular, setting mobile termination rates below fixed rates, increasing asymmetries by 375% and allowing established players 8 years of guaranteed asymmetry would amount to a first in the regulatory world. There is no basis for such bizarre regulatory outcomes.

5.5 ICASA needs a robust cost-based view and proportionality analysis to justify such a radical approach. Notwithstanding its requests, MTN has not been shown such an analysis. In the absence therefore, MTN submits that the Draft Regulations are arbitrary, irrational and unreasonable.

APPENDIX A – comparative analysis of the 2010 Call Termination Regulations and 2013 Draft Call Termination Regulations and detailed commentary on the Draft Call Termination Regulations.

	2010 Call Termination Regulations	2013 Draft Call Termination Regulations	MTN Comments
Market definition	"The markets in which the Authority intends to propose impose pro-competitive measures, if such markets are found to have ineffective competition are the markets for mobile and fixed wholesale call termination services in the Republic. These markets are categorised according to the type of service provided to the end user and are defined as follows:	"~~The markets in which the Authority intends to propose impose pro-competitive measures, if such markets are found to have ineffective competition are the markets for mobile and fixed wholesale call termination services in the Republic.~~ The markets are categorised according to the type of service provided to the end user and are defined as follows: Market 1: The market for wholesale	S. 67.6.a of the ECA provides: "When defining the relevant market or market segment the Authority must consider the non-transitory (structural, legal, or regulatory) entry barriers to the applicable markets or market segments and the dynamic character and functioning of the subject market or market segments". The rationale provided at paragraph 2.1. of the Draft Call Termination Explanatory Note for the unchanged

	Market 1: The market for wholesale voice call termination services to a mobile location on the network of each licensee who offers such a service within the Republic. Market 2: The market for wholesale voice call termination services to a fixed location on the network of each licensee who offers such a service within the Republic, consisting of: i) the market segment for wholesale voice call termination to a fixed location within an ON geographic area code; and ii) the market segment for wholesale voice call termination to a fixed location between an ON geographic area code"	voice call termination services to a mobile location on the network of each licensee who offers such a service within the Republic. Market 2: The market for wholesale voice call termination services to a fixed location on the network of each licensee who offers such a service within the Republic, consisting of: i) the market segment for wholesale voice call termination to a fixed location within an ON geographic area code; and ii) the market segment for wholesale voice call termination to a fixed location between an ON geographic area code"	market definition is that that there is "no technological change that changes the characteristics of termination to a mobile versus fixed location". This suggests that a single criteria was considered for the market review (i.e. technological change). The Authority does not therefore appear to have considered the additional factors highlighted in S. 67.6.a. of the ECA in reviewing market definitions. MTN notes the 2013 Draft Regulations now omit any reference to "the markets for mobile and fixed wholesale call termination services in the Republic". This welcome

			clarification makes it plain that the relevant markets are Markets 1 and 2, as defined. The market definition ("termination on the network of each ECS/ECNS licensee") necessarily implies a 100% market share in all the individual relevant markets. This interpretation is made plain by regulation 6: "The Authority determines that <u>each</u> ECNS and ECS licensee that offers wholesale call termination services has SMP <u>in its own market</u>." [our emphasis] MTN concludes that the market definition in the Draft Regulations clarifies beyond any doubt that the

			Authority is of the view that each and every licensee offering call termination services in South Africa has 100% market share in the relevant call termination markets. Any other conclusion would require the Authority to define a different, and wider, relevant market using the provisions in the ECA. Additionally, it would need to demonstrate the linkage of this wider with the markets defined in terms of Regulation 3.
Methodology	In determining the effectiveness of competition in the wholesale call termination markets, the Authority has applied the following methodology: a) the identification of relevant markets and their definition according to the principle of the Hypothetical Monopolist	Unchanged	Although the 2013 Draft Regulations suggest that the Authority has applied the same methodology as in 2010 when analysing markets and the effectiveness of competition, there is no evidence that this analysis has actually taken place.

	Test, taking into the non-transitory (structural, legal, or regulatory) entry barriers to the applicable markets or market segments and the dynamic character and functioning of the subject market or market segments". b) the assessment of licensees market shares in the relevant markets; and c) the assessment on a forward looking basis of the level of competition and market power in the relevant markets.		The Hypothetical Monopolist Test involves understanding the impact of a 10% price increase on a hypothetical monopolist's profits, in order to infer market boundaries from supply substitutes. Whereas such an analysis was indeed performed (and published in GG33121) prior to the 2010 Call Termination Regulations, the 2013 Explanatory Note does not reproduce this complex analysis. However, it is necessary to do so when re-validating the market boundaries for Market 1 and 2. MTN requests that this analysis be made available by the Authority (if it has been done).

			Similarly, the Authority suggests an assessment of market shares has been performed in the relevant markets. The only “relevant markets” eligible for analysis are Markets 1 and 2, which, by definition (“termination on the network of each ECS/ECNS licensee”) implies a 100% market share in all the individual relevant markets. The Explanatory Note to the Draft Regulations Explanatory Note does indeed suggest that an analysis of market shares was performed (paragraph 4.2 of Explanatory Note), but: - the Authority is clearly

			analysing markets that are distinct from the relevant markets defined in Regulation 3 (else all market shares should be 100%); and - whereas the 2010 Regulations analysed market shares in terms of volumes, the Authority now appears to adopt a "revenue" market shares in the wider market it is analysing. MTN requests that this shift to "revenue" market shares be explained and justified. The Authority is also requested to explain how it relates to the "volume" share thresholds proposed in Regulation 7.3.b. Furthermore, given the importance of

			market shares in determining which licensees may charge asymmetrical rates, MTN requests the Authority to provide guidance on how market shares are being calculated (revenue vs traffic, national interconnection minutes only, national plus international interconnection minutes, total terminated minutes, including on-net traffic, etc.).
Effectiveness of competition	"Pursuant to regulation 3, the Authority has determined that competition in the wholesale voice call termination market is ineffective."	"Pursuant to regulation 4, the Authority has determined that competition in the wholesale voice call termination market is ineffective, <u>owing to ineffective pricing."</u> [our emphasis]	The rationale offered by the Authority to support its finding of ineffective competition is both bizarre and worrying. It is common cause that prices in the relevant call termination markets have been regulated since March 2011 on the basis of the 2010 Call Termination Regulations.

			This suggests that the Authority has created the very market failure ("inefficient pricing") that it is now seeking to perpetuate in the Draft Regulations. The Authority must show why the 2013 Draft Regulations will not create further "inefficient pricing" conditions in Markets 1 and 2, as they did, by the Authority's own admission, after 2010. Unless the Authority is able to establish this, it would necessarily mean that the Draft Regulations are irrational and arbitrary.
SMP determination	"The Authority determines that <u>each</u> ECNS and ECS licensee that offers wholesale call termination services has	Unchanged	ICASA's own SMP analysis indicates that each licensee has 100% market share in the relevant markets.

	SMP in its own market."		
Pro-competitive terms and conditions	The Authority has identified the following market failures in the respective wholesale call termination markets: a) a lack of the provision of access b) the potential for discrimination between licensees offering similar services c) a lack of transparency d) inefficient pricing	The Authority has identified the following market failures in the respective wholesale call termination markets: ~~a) a lack of the provision of access~~ ~~b) the potential for discrimination between licensees offering similar services~~ ~~c) a lack of transparency~~ ~~d)~~ a) inefficient pricing	It appears that the Authority perceives substantial improvements in the competitiveness of the relevant markets as it now only identifies one out of four previous market failures. In accordance with S.67.8.c of the ECA, MTN requests the Authority to explain how it can be "proportionate" for the substantial improvements in competitive conditions highlighted in its own findings to lead to a tightening of economic remedies on MTN (termination rates cut by 75%, asymmetries increased by 375%). MTN has already highlighted the irony of the Authority's finding of inefficient pricing in circumstances where ICASA itself has been setting call termination prices since 1 March 2010.

			MTN further highlights the irony of the Authority's proposals for a 19c asymmetry in March 2014 when it was concerned, in 2010, with potential discrimination between licensees offering similar services.
	All licensees must comply with the following pro-competitive terms and conditions to overcome the market failures identified in regulation 7(1) a) Compliance with the provisions of the Interconnection Regulations (Government Gazette No. 33101 of 2010) b) Compliance with the Compliance Manual Regulations to be prescribed by the Authority c) Charge fair and reasonable prices for wholesale call termination consistent with	All licensees must comply with the following pro-competitive terms and conditions to overcome the market failures identified in sub regulation (1) ~~a) Compliance with the provisions of the Interconnection Regulations (Government Gazette No. 33101 of 2010)~~ ~~b) Compliance with the Compliance Manual Regulations to be prescribed by the Authority~~ a) Charge fair and reasonable prices for wholesale call	MTN notes the Authority's proposal to remove the pro-competitive remedy previously imposed on all licensees to adhere to the Interconnection Regulations (GG 33101 of 2010). This is a decision of major regulatory significance, yet it does not receive a mention in the Explanatory Note. The impact of such a proposal on the industry cannot be understated in markets where all licensees have been declared to have SMP.

	Appendix B	termination consistent with Appendix A	MTN requests the Authority to explain this decision, and how it foresees the interconnection regime going forward without this pro-competitive remedy. MTN also seeks clarification on whether the Interconnection Regulations will be repealed as a result of this proposal. Finally, MTN seeks clarification on whether the Authority will repeal the Compliance Manual Regulations.
	The Authority has determined that additional pro-competitive terms and conditions are necessary to correct the market failures identified in regulation 7(1), which are to be imposed on the following licensees:	Unchanged, save that the Draft Regulations now read: “respective market shares of greater than 20 per cent as of December 2012.”	MTN requests the Authority to explain what is meant by “benefiting from reciprocal treatment by the Authority in the allocation of spectrum”, and to indicate which licensees fall into this category.

	(a) Licensees that have historically benefitted from reciprocal treatment by the Authority in the allocation of spectrum; (b) Licensees that benefit from economies of scale and scope in maintaining a share of total minutes terminated in the respective markets of greater than 25 per cent as of June 2009.		It is not clear to MTN what benefit can arise from "reciprocal treatment". Indeed, MTN notes that MTN, Vodacom and Cell C have the same mobile spectrum allocations, that is: - 2*11MHz of spectrum in the 900MHz band; - 2*12MHz of spectrum in the 1800MHz band; and - 2*15MHz in the 2100MHz band. MTN notes that Cell C benefitted from the Authority's decision to grant 1800Mhz spectrum to Cell C whilst deciding at that time that MTN was to be excluded from a similar allocation. MTN was later granted 1800Mhz spectrum.

			MTN further notes that Telkom has benefited from substantially more favourable spectrum allocations than MTN (210MHz of spectrum allocated in the prime 800-3500MHz bands, vs just 76MHz allocated to MTN in the same bands). See appendix B. Given the above and the substantial financial and competitive impact of the proposed 19c asymmetry, MTN requires the Authority to clarify the import and application of regulation 7.3.a. It appears to have no discernible meaning. In addition, the Authority's market definition and SMP finding imply that all licensees have 100% market share in the relevant markets. The 20% threshold proposed in regulation

			7.3.b. is therefore irrelevant for all practical purposes. Notwithstanding the above, MTN notes that the Authority now sees "benefits from economies of scale and scope" accruing from a threshold of 20% of total terminated minutes in the relevant markets, rather than 25% in 2010. It further notes that this threshold reduces to 10% from 1 Mar 2019 (Appendix A, para 2.3 and 2.4). MTN is unable to understand how the asymmetry thresholds (supposedly reflecting "efficient scale and scope") can fluctuate over time. Finally, MTN notes that the Authority

			proposes to compute its scale and scope benefits “thresholds” based on December 2012 traffic statistics. The new termination rates will not apply until March 2014, a full 14 months after this determination. Because of this time lag, MTN calculates that Cell C may benefit from a ***[confidential]*** asymmetry “subsidy”, even though it will already have exceeded the “scale and scope” efficiency threshold determined by the Authority in terms of its Draft Call Termination (at least in subscriber terms) by 1 March 2014. See asymmetry calculation in Appendix B.

	(4)The Authority determines that the following licensees have these characteristics: (a) Market 1: i. MTN ii. Vodacom (b) Market 2: i. Telkom	(4)The Authority determines that the following licensees have the characteristics listed in sub regulation (3): (a) Market 1: i. MTN Pty Ltd (MTN) ii. Vodacom Pty Ltd (Vodacom) (b) Market 2: i. Telkom SA SOC Limited (Telkom)	MTN cannot see how the Authority has reached this conclusion, and requests the Authority to publish its reasoning in support of such a finding. On the face of it, the finding in regulation 7.4 is arbitrary and irrational since there is no basis for MTN and Vodacom to be singled out. MTN has shown that MTN, Vodacom and Cell C enjoy the same spectrum allocations (albeit at favorable financial terms for Cell C), while Telkom is enjoying substantially larger spectrum allocations than the aforementioned licensees. Neotel is also the recipient of a generous spectrum asymmetry (90MHz in the 800-3500MHz bands,

			including the only block currently licensed in the valuable 800MHz band). MTN has also shown that, according to ICASA's own findings, all mobile licensees have 100% market share in the relevant market: "The market for wholesale voice call termination services to a mobile location on the network of each licensee who offers such a service within the Republic." MTN therefore submits that *all* mobile licensees currently offering voice termination services (including Neotel, via its converged fixed/mobile Neosmart product), satisfy the requirements of regulation 7.3. There is simply no basis for the Authority's finding that only MTN and Vodacom

			satisfy the requirements of regulation 7.3. The same conclusion extends to all licensees offering services in Market 2.
	All licenses referred to in regulation 7(4) of these regulations must comply with the following additional pro-competitive terms and conditions a) publication of a Reference Interconnection Offer (RIO) […] b) Price Control: Cost oriented pricing […] c) Accounting separation and Cost Accounting	(5) Additional pro-competitive terms and conditions (a) Price Control: Cost oriented pricing […] (b) Bottom-up LRIC cost model […]	MTN notes the Authority's intention to withdraw the requirement for a RIO. MTN notes the substantial changes that are proposed to the additional pro-competitive remedies applicable to it. The impact of these changes are substantial, and profoundly affect the MTN business plan relative to the 2010 regulations: - the proposals represent a

			[confidential] EBITDA reduction against MTN business plan over the next three years; - the proposed asymmetry levels represent a ***<u>[confidential]</u>*** regulatory subsidy to a direct competitor, further impacting MTN's business prospects as these funds are used by to gain market share; - the production of information for the development of a LRIC model could turn into a costly accounting separation and cost accounting exercise, as MTN needs to deploy human and, presumably, auditing resources to produce such information (at very short

			notice). MTN requests that these changes be justified by the Authority in terms of the principle of proportionality contained in S. 67.8.c of the ECA. Notwithstanding its requests, MTN has not been shown any evidence to establish that such a proportionality analysis was performed by the Authority. MTN submits that, as a matter of logic, the Authority cannot come to this conclusion in a relevant market where each licensee has been found to hold 100% market share. Even looking at the wider retail mobile market, all indicators and

			commentators show the market is becoming *more* competitive, not *less*. MTN therefore submits that the Authority's proposed changes to the pro-competitive conditions imposed on MTN are disproportionate, and in conflict with S.67.8.c of the ECA. MTN cannot meaningfully engage with the Authority on the rates proposed in Table 1 as the draft regulation and explanatory note are silent on the methodology and cost inputs used to derive these figures. MTN repeats its request that this methodology and the relevant costing inputs used by the Authority be made available to it, so they can be properly interrogated.

			MTN further notes that: - No new cost data has been filed with the Authority by MTN since its last COA/CAM submission (2008) was used to set the target rate of 40c in the 2010 Regulations; - The Call Termination Questionnaire (GG 36532), focused on retail and termination traffic / revenues statistics, and cannot be the basis for a cost study (since no cost information was requested or provided, and no cost data could possibly have been inferred from MTN's response); - MTN has invested many billions Rand of capex in its voice network since 2009 to

			cater for voice coverage and capacity improvements. Any cost-oriented rate must take account of this incremental investment; - The proposed 10c target rate is not justifiable on the basis of global or regional of benchmarking (see appendix B). - In particular, the proposed 10c rate is substantially lower than the rates derived using the cost standard proposed by ICASA in terms of Regulation 5.b): Tanzania (17c target in 2017) and Nigeria (24c target in 2015) are two regional jurisdictions that used a bottom-up, forward looking LRIC model developed by

			PwC. The rates contained in Table 2 are substantially higher than the average rate benchmarked for fixed call termination across 34 European countries (average of 7c). See Appendix B. MTN wishes to understand how the Authority arrived at the conclusion that the cost of terminating a call in Market 1 (10c) is lower than the cost of terminating a call in Market 2 (12-19c). Such a remarkable finding is a world first. MTN asks to be furnished with the cost modeling used to support this finding. Finally, MTN would like to highlight that the Authority never published the

			Accounting Separation and Cost Accounting Regulations envisaged in terms of Regulation 5.c.i. of the 2010 Call Termination Regulations. MTN submits that these regulations should be published before applying new cost accounting obligations on MTN in terms of the 2013 regulations.
Schedule for review of markets	The Authority will review the wholesale call termination markets to which these regulations apply, as well as the effectiveness of competition and the application of pro-competitive measures in those markets, after a minimum of three (3) years from the publication of these regulations.	The Authority will review the wholesale voice call termination markets to which these regulations apply, as well as the effectiveness of competition and the application of pro-competitive measures in those markets, as and when necessary, based on observable trends in the defined markets.	The 2010 Regulations indicate that a review of the call termination markets will take place after "<u>a minimum of</u> three (3) years from the publication of these regulations" [our emphasis]. Since the 2010 Call Termination Regulations were published on 29 October 2010, a review of the call termination markets could not have taken place in terms of the 2010 Call Termination Regulations until 29

			October 2013. However, the Draft Call Termination Regulations were published in on 11 October 2013. It is plain, therefore, that the Authority has commenced its review process prematurely and in a manner that is inconsistent with Regulation 8 of the 2010 Call Termination Regulations. MTN further submits that "as and when necessary" is such a vague timescale that it does not comply with the Authority's obligations under S. 67.4.f of the ECA.
Application of the Fair and Reasonable obligation	1.1. For the purposes of regulation 7(2)(c), "fair and reasonable" prices are rates that are equivalent to the cost-oriented	No changes	Paragraph 1.1 of appendix A provides that ""<u>fair and reasonable" prices are rates that are equivalent to the cost-oriented rates</u> imposed on the

(appendix A)	rates imposed on the licensees identified in Regulation 7(5) (b). 1.2. Licensees must charge the following rates: 1.2.1. Reciprocal rates with the rate set for MTN and Vodacom if these licensees are in Market 1; 1.2.2. Reciprocal rates with the rate set for Telkom if these licensees are in Market 2.		licensees identified in Regulation 7(4)". [our emphasis] It follows that the fair and reasonable rates that all licensees must charge in terms of Regulation 7.2.a. must be (a) equivalent to the rates charged by MTN and (b) cost oriented. A rate of 39c can obviously not be said to be "equivalent" to a rate of 20c. Notwithstanding its request, MTN has not been provided with any evidence establishing that the rates proposed in Table A1 are cost-oriented. MTN requests the Authority to produce the cost modelling used to derive the rates proposed in Table A1,

			and the 160% cost premium supposedly incurred by Cell C and Telkom Mobile in Market 1 in 2016. In the absence of this modelling evidence, MTN makes the following submissions: - The continuation of asymmetry for another five years, its potential application to Cell C (a player that has been in the market for 12 years and has close to 20% market share) and the increase in asymmetry levels amount to a world's first (see Appendix C). Such a departure from best practice must be thoroughly justified by the Authority, failing which it will be irrational and arbitrary. - The Authority made definitive

			statements in the Explanatory Note accompanying its 2010 Call Termination Regulations on the need for time- and value-limited asymmetries to ensure efficient investment, and maximize welfare (see paragraphs 2.4.5.4 and 8 in Explanatory Note, 2010). The Draft Regulations radically overturn this position. The Authority must explain and justify why it has now come to a different conclusion about the impact and welfare value of asymmetries in 2013. The Authority has not done so. - No cost-benefit analysis is apparent in the Draft Regulations for the ***[confidential]*** competitive

			subsidy that will be handed over to Cell C over the regulatory period (when Cell C is already adding 1 million subscribers a month and growing revenue market share in a 4c asymmetry environment). - The proposed levels of asymmetry are substantially higher than those seen in a (declining) pool of asymmetric jurisdictions, averaging 4c (see appendix B). The Authority must justify why it considers 375% higher levels of asymmetry are required and justifiable in South Africa. The Authority has not done so. MTN is also highly concerned about

			the regulatory and planning asymmetry embedded in the Draft Regulations. Whereas the licensees listed in Regulation 7(4)(a) see their rates set for a period of three years (subject to the outcome of the LRIC cost model (regulation 5(b)(iv)), the other licensees have their rates set (based on a December 2012 snapshot), for a period of 5-6 years, regardless of the outcome of Regulation 5(b)(iv), and regardless of their market progress (eg. even if they exceed the 20% threshold in regulation 3.b). All licensees are required to charge fair and reasonable rates (Regulation 7(2) a). Fair and reasonable rates are defined in Appendix A as "*rates that*

			are equivalent to the cost oriented rates imposed on [MTN]”. MTN cannot therefore understand how the glide path enjoyed by asymmetrical players in Market 1 can differ in length from the glide path applied to MTN. By virtue of the “fair and reasonable” obligation, the two glide paths are inextricably linked, in level and duration. This also means that the output of the BU-LRIC model proposed in Regulation 7(5)(b) necessarily affects MTN and asymmetrical players equally. MTN submits that the Draft Regulations should provide the same level of planning visibility and certainty for all licensees, and the glide paths (and timeline for review) for symmetrical and asymmetrical rates

			should therefore be aligned. The Authority seeks to justify asymmetry on the basis of smaller operators' lack of scale and scope. The Authority proposes that licensees continue to benefit from asymmetrical rates, even if they breach the "efficiency" threshold within the next 5 years. MTN submits that this is irrational and unreasonable. There is no reason why licensees should continue to receive asymmetrical benefits if the alleged reason for it (lack of scale and scope) has ceased to exist.
	1.3 Licensees not listed in Regulation 7(4) may charge higher termination rates based on the following factors:	2. Licensees not listed in Regulation 7(4)(a) may charge higher termination rates based on the following factors:	MTN has already commented on that fact that: - all licensees in Market 1 and 2 have been found to have

	1.3.1. Spectrum allocation. A licensee must justify why it is adversely affected by current spectrum allocation; 1.3.2. Economies of scale and scope based on the share of total minutes terminated in the relevant market. A licensee qualifies, for a period of 5 years from the 1st March 2014, for an asymmetric rate if it has less than 20 per cent of total terminated minutes in the relevant market as of December 2012; 1.4 A licensee may only qualify for an asymmetric rate if either or both factors are applicable.	2.1. Spectrum allocation. A licensee must justify why it is adversely affected by current spectrum allocation; 2.2. Economies of scale and scope based on the share of total minutes terminated in the relevant market. A licensee qualifies, for a period of 5 years from the 1st March 2014, for an asymmetric rate if it has less than 20 per cent of total terminated minutes in the relevant market as of December 2012; […] 2.6 A licensee may only qualify for an asymmetric rate if both factors are applicable. “	100% market share in the relevant markets (as defined by the Authority). - No licensee currently offering service in Market 2 could justify adverse spectrum allocation; and so - the provisions of paragraph 2 cannot apply to any licenses in Market 1. Furthermore, paragraph 2 of Appendix A to the Draft Regulations provides that “a licensee must justify why it is adversely affected by current spectrum allocation”, and that it may “qualify” for asymmetry in certain circumstances. It is not apparent from paragraph 2 to who the licensee must “justify” its spectrum deficiency or who will decide whether the licensee

			"qualifies" for asymmetry, and how. This renders much of paragraph 2 unworkable. MTN further submits the proposed implementation of the fair and reasonable obligation, as described in appendix A is unworkable. Paragraph 1.2 suggests "licensees *must* charge the following rates": [our emphasis]; Draft Regulation 7(2)(a) makes clear this obligation applies to all licenses offering voice call termination services in the Republic. Paragraph 2 of Appendix A then suggest some licensees "*may* charge higher termination rates" [our emphasis]; this directly contradicts Paragraph 1.2, which states that all

			licenses must charge reciprocal rates. Paragraph 2.2 then suggests "*a licenses qualifies, for a period of 5 years from the 1st March 2014, for an asymmetric rate* […]". The Authority does not define what "an asymmetric rate" is anywhere in the Regulations. Similarly, paragraph 2.4 reads: " *Licensees with a market share greater than 10% after five years have passed are obliged to charge symmetrical rates"* The Authority does not define what symmetrical rates are. Nor does the Authority specify which market the 10% market share refers to, or how this market share will be measured and assessed. Also, is the Authority suggesting a licensee with less than 10% market share five years

			from 1 March 2014 will continuously receive an asymmetry (even if its share subsequently increases above 10%)? Paragraph 2.3 reads: "Thereafter, a licensee qualifies for an on-going asymmetric rate of 40% […]. Again, the Authority fails to define what an "asymmetric rate of 40%" is. If an asymmetric rate is a rate contained in Table A1, then MTN submits the Authority cannot possibly determine that an asymmetric of 40% amounts to 10c on 1 March 2019, unless the Authority already knows what MTN's rate will be on 1 March 2019. More generally, MTN submits the rates provided in Table A1 for the period 2017-19 cannot be said to be "Asymmetry Rates" unless the

			Authority has already made up its mind about the rates MTN will be charging for that period. MTN submits it would be wholly inappropriate if the Authority had already done so. Adding to the confusion is the fact that Table 6 of the Explanatory note suggests the maximum rate applicable from 1st March 2019 is in fact 20c, The application of the fair and reasonable obligation in Market 2 is equally confusing. Paragraph 3.1. reads: "A licensee qualifies, for a period of 5 years from the 1st March 2014, for an asymmetric rate of 10% above the rates specified in Table 2 of these Regulations […]".

			Table 2 of the Draft Regulations contains rates for the period 1 March 2014 to 1 March 2016. MTN cannot see how an asymmetric rate of 10% applicable for five years can be derived from a table setting rates for three years only. MTN respectfully requests the Authority to reconsider its proposed application of the fair and reasonable obligation as currently described in Appendix A.

APPENDIX B – Supporting data and analysis

[Confidential]

Appendix C - The European Commission’s approach to termination rate asymmetries.

1. Summary

On 7 May 2009, the European Commission (EC) issued a Recommendation on the Regulatory treatment of Fixed and Mobile Termination Rates in the EU (the Recommendation)[4]. In it, the EC proposes harmonised principles for the setting of termination prices on a LRIC basis. It also recommends symmetry of termination rates and that any inherited asymmetry currently present in the fixed or mobile call termination markets be removed by 2012.

This is on the basis that:

- asymmetrical rates lead to consumers having to pay higher prices than in a symmetrical regime;
- allowing asymmetries on the basis of actual costs provides no incentives to become efficient (and may in fact doubly reward inefficiency via a subsidy paid by one’s competitors);
- entry assistance through interconnection may promote inefficient entry, which in turn leads to higher long run prices for consumers.

The EC acknowledges that in certain exceptional cases asymmetry might be justified on the basis of objective cost differences outside the control of the operators concerned (exogenous cost differences). But it also concludes that:

- spectrum-based justifications for asymmetries go away as entrants grow share and investment moves from coverage to capacity;
- spectrum trading or the imminent release of spectrum, especially in the lower bands (digital dividend) makes any cost difference endogenous (and therefore cannot be used to justify asymmetries);
- asymmetries based on lower scale may only be considered for mobile networks (who are subject to coverage obligations) and in any case for no more than 3-4 years after

[4] Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC)

market entry (the time deemed necessary to reach a 15-20% market share, measured in subscribers, deemed to be the minimum efficient scale);

- the EC was not able to identify any objective cost differences justifying asymmetric rates in the fixed call termination market.

This note looks at the reasons put forward by the Commission in support of the above conclusions and draws conclusions for the proposed asymmetries in South Africa.

2. Rationale for symmetrical termination rates

In the Recommendation, the EC states (paragraph 7):

> *"In view of the specific characteristics of call termination markets and the associated competitive and distributional concerns, the Commission has for a long time recognised that setting a common approach based on an efficient cost standard and the application of symmetrical termination rates would promote efficiency, sustainable competition and maximise consumer benefits in terms of price and service offerings."*

Key to that conclusion is the issue of efficiency incentives. At paragraph (0 of the Recommendation, the Commission states that:

> *Operators which are compensated for actual costs incurred for termination have few incentives to increase efficiency.*

In the Explanatory Note accompanying the Recommendation[5], the Commission further explains that (paragraph 4.2):

> *"An important argument for symmetric termination rates at the level of efficient cost is that asymmetric pricing can foster inefficient behaviour and generate productive inefficiencies. Productive efficiency takes place when a good is produced at the lowest cost possible. Rewarding an operator with a price above an efficient or cost-based level can reduce its incentives to innovate and minimise costs. For example,*

[5] Commission Staff Working Document accompanying the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU. Explanatory Note {C(2009) 3359 final}, {SEC(2009) 599}

asymmetries based on differences in dates of market entry and scale may discourage innovation and cost efficiency on the part of the later entrant/smaller operator, and may give rise to inappropriate investment incentives and inefficient entry.

Consequently, consumers may end up paying higher prices than would otherwise be the case in a situation of cost-based symmetric termination rates. This is because the higher termination rates have to be recovered by the originating operators and will presumably be passed onto consumers in the form of higher retail prices. This effectively creates a cross-subsidy from lower-cost operators and their consumers to their less efficient rivals, thereby generating allocative-efficiency concerns.

Meanwhile, the less efficient operator benefits from the lower termination rates of its rivals, thus enabling it to lower its retail prices and win customers. As the subsidised operators expand, the negative impact on retail prices and consumer welfare is even greater. Given that the stated purpose of the regulation of wholesale termination charges is to prevent excessive pricing and its negative impact on consumer welfare, it is arguably counter-intuitive to apply a remedy that also generates allocative and productive inefficiencies."

3. Criteria to justify asymmetries

Despite its strong view that symmetrical rates should be adopted in the fixed and mobile markets, the Commission also recognises that in exceptional circumstances, time-limited asymmetries may be justified based on objective, quantifiable, exogenous cost differences (see paragraph 3.1.3 of the Explanatory Note):

"The Commission recognised that in certain exceptional cases asymmetry might be justified by objective cost differences outside the control of the operators concerned. Such possible justifications could be objective network cost differences, for instance owing to cost differences between the operation of a GSM900 network and a DCS1800 network, or substantial differences in the date of market entry."

The Commission therefore accepts two potential, objective, exogenous cost differences to justify a time-limited departure from the symmetry principle: spectrum or inefficient scale at entry. These two factors are discussed below.

3.1. Spectrum-related asymmetries

The Commission acknowledges that uneven spectrum assignments may lead to higher network costs which are outside the control of the operator concerned. In its Explanatory Note, however, it highlights that such asymmetries only hold in the early years of network deployment and that spectrum liberalization or imminent release of spectrum make any on-going cost difference endogenous (and therefore not eligible to justify termination rates asymmetry). Paragraph 4.2. of the Explanatory Note states as follows

> *"The extent of this [spectrum] cost disadvantage depends on a number of factors, including the regulatory situation, the nature of the demand for coverage and the geography and topology of the country. It appears that this relative cost disadvantage decreases as the market shares of the later entrants grow, increasing their capacity needs. In addition, where the spectrum assignment takes place through a market-based mechanism such as an auction or where there is a secondary market in place, any frequency-induced cost differences become more endogenously determined and are likely to be significantly reduced or eliminated. Moreover, with further spectrum liberalisation taking place, it needs to be examined whether on a forward-looking basis additional spectrum is likely to be made available through market-based assignment processes which might erode any cost differences arising from existing assignments. For example, the digital dividend is leading to the release of spectrum that is being freed up as a result of the switchover from analogue to all-digital television. The spectrum that will be released by the digital switchover is in the prime Ultra High Frequency (UHF) band. Since these bands are located in the lower spectrum range they can cover large geographical areas with relatively few base stations, offering nationwide network rollout at lower costs when compared to services delivered at higher frequencies, offering greater capacity but at shorter range."*

3.2. Scale-related asymmetries

In a similar fashion, the Commission recognises the issue of sub-scale entry, but warns against the on-going justification of asymmetry on this basis (paragraph 4.2 of the Explanatory Note):

> *"Arguments relating to economies of scale and the higher unit costs initially incurred by new entrants have in particular been raised as possible justification for transitory asymmetry in termination rates. The Commission has previously noted in that respect that objective cost differences due to substantial differences in the date of market entry could represent a possible justification for asymmetry. At the same time, it should be borne in mind that rewarding an operator for its smaller size can give inappropriate investment signals and risks promoting inefficient entry. Such a policy may, for example, act as a disincentive to smaller operators to innovate and expand. In that respect, the Commission has previously stated that the fact an operator entered the market later and that it therefore has a smaller market share can only justify higher termination rates for a limited transitory period. The persistence of a higher termination rate would not be justified after a period long enough for an operator to adapt to market conditions and become efficient and could even discourage smaller operators from seeking to expand their market share."*

This view then focuses the debate of what is, and how to measure, minimum efficient scale. On these issues, the Commission offers the following guidance, based on the European Regulators Group (ERG) common position:

> *"Following the above considerations, it is important, after having identified impediments on the retail market to market entry and expansion, to limit any asymmetries allowing new mobile entrants to recoup their higher incremental costs compared to those of a modelled efficient operator for a transitional period before a minimum efficient scale can be expected to be reached. Drawing upon the ERG Common Position on symmetry, it is reasonable to envisage a timeframe of four years (from the date of entry of the operator concerned) for phasing out asymmetries in mobile markets, based on the estimation that in the mobile market it can be expected to take three to four years to reach a market share of between 15 and 20%."*

The Commission is clear that market shares should be measured in terms that are relevant to unit costs (subscribers or traffic), not business or financial measures (eg. revenues). In fact it highlights that the ERG common position is based on a subscriber market share measure for minimum efficient scale (paragraph 5.2.4 of the explanatory note):

> *"The ERG's assessment, that in a mature mobile market it can be expected to take three to four years for a new entrant to reach a market share of between 15 and 20%, involves a market share reference relating to the number of subscribers."*

3.3. Fixed termination asymmetries

It is clear that a spectrum-related justification for asymmetry is not open to players offering fixed call termination. But it is important to note that the Commission also concludes that entry-related, efficient scale asymmetry is not applicable to fixed networks. The Commission gives the following reasons (para.4.2 of the Recommendation):

> *"As regards the extent to which new entrants might be expected to have higher unit costs than incumbents, it has been argued that this consideration is more relevant for mobile than for fixed operators. Fixed operators have the opportunity to build their networks in a particular geographic area and focus on higher-density routes. Furthermore, they can lease relevant network services from the incumbent to reduce the fixed costs of network build and thereby reduce the impact of economies of scale."*

In fact, in the Recommendation, the Commission concludes that no objective cost differences justifying a departure from the symmetry principle has been identified in the fixed termination market (paragraph 16):

> *"In setting termination rates, any deviation from a single efficient cost level should be based on objective cost differences outside the control of operators. In fixed networks, no such objective cost differences outside the control of the operator have been identified."*

The Commission's conclusions are stark: while asymmetry may be justified in exceptional circumstances and for no more than 3-4 years after entry in the mobile market, there is no objective rationale for asymmetries in the fixed market.

3.4. Entry assistance

These stark conclusions lead the Commission to consider whether "entry assistance" is another possible justification for asymmetries. Its conclusions are equally blunt (para 4.2 of the Explanatory Note):

> *"A key argument frequently used in support of the authorisation of temporary asymmetric rates in favour of later entrants, and in the absence of any verifiable objective cost differences, is that it forms part of an overall entry assistance policy which is aimed at promoting new entry and longer-term competition in fixed and mobile markets. The rationale is that allowing higher post-entry profits will encourage entry and investment and lead to more intense competition in the long run. However, it is generally accepted that such a policy may also attract inefficient entry. It may also be expected that consumers will end up paying higher retail prices than would otherwise be the case in a situation of cost-based symmetric termination rates. In addition, providing a mark-up for new entrants while regulating incumbents at cost effectively creates a cross-subsidy and can simultaneously reduce the incumbents' investment incentives.*
>
> *In the light of the above, it is questionable whether asymmetric termination rates should be used as a form of entry assistance. On the contrary, it may be argued that symmetric price control based on an efficient-cost benchmark, rather than on the costs actually incurred by an operator, gives efficient investment incentives to firms. These considerations apply to both fixed and mobile markets."*

4. Outcome of the EC Recommendation

The strong EC guidance on symmetry changed the termination landscape across Europe. In mobile, historical MTR asymmetries are disappearing and most EU regulators have either enforced symmetry or provided a clear timeline for the removal of inherited asymmetries.

Out of 34 countries surveyed in January 2013 across Europe, only 11 maintained MTR asymmetries, and many of those have a clear timeline towards achieving symmetrical MTRs.

Mobile Termination Rates asymmetries in Europe[6]

MTR symmetry achieved	Continued MTR asymmetry
Austria Belgium Czech Republic Germany Denmark Estonia Greece Finland Croatia Hungary Ireland Iceland Malta Netherlands Norway Poland Portugal Romania Serbia Sweden Slovenia Slovakia United Kingdom	Bulgaria Switzerland Cyprus Spain France[7] Italy Lithuania Luxembourg Latvia Former Yugoslav Republic of Macedonia Turkey

[6] Source: Termination Rates Benchmark Snapshot (as of January 2013): Integrated Report on Mobile Termination Rates, Fixed Termination Rates and SMS Termination Rates, BEREC, Jan 2013

[7] asymmetry was removed in July 2013

1) asymmetry was removed in July 2013

It is worth noting the weighted average asymmetry (by subscribers) in the asymmetric group can be calculated using the data provided by BEREC. It amounts to ZAR 0.04.

Appendix D

[Confidential]

Appendix E – Comparison of Fixed and Mobile Cost Structures (GSMA).

Appendix F - The impact of recent cuts in mobile termination rates across Europe (Frontier Economics).

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