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14 June 2013

Attention: Ms Adelaide Masemola
Director: Economic Analysis and Scenario Construction
ICT Policy and Strategy Branch
Department of Communications
Private Bag X860
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By email: ictreviewpanel@doc.gov.za

Dear Madam

CELL C'S RESPONSE TO THE DRAFT ICT POLICY REVIEW FRAMING PAPER, 2013

Cell C (Pty) Ltd (Cell C) is pleased to respond to the public consultation on the draft ICT Policy Review Framing Paper, 2013. We have set out our comments, queries and observations on each of the sections under Chapter 3 of the Framing Paper.

In summary, our comments are concerned with the following key points:

- (a) Cell C is concerned that the Framing Paper for a Policy review does not contain, emulate or acknowledge the basic characteristics of a policy document. We understand that the Framing Paper is intended to form the basis of the Policy Review process and ultimately, a Green and White Paper. These documents are typically based on and emanate from an agreement on what policy should be followed. That policy sets the stage for legislation and regulation. If the policy context is not appropriate or adequate, legislation may be subject to varying interpretation, drafting will be made more difficult, and application will be subject to challenge on the basis that policy is too vague to apply. Policy statements or other forms of policy must first and foremost endeavour to capture the status quo, and then engage with objectives and goals for the future, but these cannot be created in a vacuum.



- (b) The starting point is therefore not appropriate in our view. A review of the status quo would have been more useful, so that setting objectives and goals would then be realistic and focussed.
- (c) The emotive language in the document is not appropriate for a policy document or framing paper. The focus of the document should be on sector priorities and not only or mainly on external perception. Communications is not a “rights-based” sector, it is a utility sector traditionally, which has become a services sector with certain cultural concerns aspirations in relation to broadcasting, but otherwise with a focus on implementing and maintaining infrastructure and providing service to consumers. The policy should be framed within this context.
- (d) Much of what is suggested, albeit in a draft form, may drive investors out of South Africa at worst, or discourage further investment, at best. The focus on ICT and specifically on licensees and their obligation to meet the needs of all South Africans as to bridging the digital divide, access to broadband, cultural preservation, and freedom of speech and other “rights” is going to dismay many international readers and put the sector in jeopardy.
- (e) There is also a focus on what the private sector should do, instead of what the public sector can and should do.
- (f) There is insufficient attention paid to the role of the regulator and Minister, and USAASA. Other related entities including the Film and Publications Board should also be considered alongside the Media Development and Diversity Agency – what roles do these entities play and what role should they play in future?
- (g) Unfortunately current challenges have not been acknowledged, and neither have international trends. South Africa does not exist as an island, but is part of and must be on trend with other international jurisdictions, best practise and accepted regulatory practise. Current challenges that are not addressed in the Paper could include the registration of certain domain names, cybersecurity, protection of children in the online environment, and the safety of online transacting.

Our specific comments follow.

1. Background (Section 3.2)

- a. In section 3.2. the document refers to a “*silo approach*” to the sector, and suggests that this approach should be reviewed so that “*we do not inadvertently create a digital divide where access to quality communications services, technologies, infrastructure and content is a privilege of the elite, rather than a right for all*”.
- b. Cell C cautions against retrospectively framing the approach to regulation of this important sector as a “*silo approach*”. The history of regulation in this sector is broadly in line with regulation in other countries and in our view, could not have been addressed in a different manner or we would have missed out on important steps in the regulation of each industry. The term “*silo approach*” is a negative one, suggesting that no regard can be or was had to other related industries. This statement directly contradicts the introductory paragraphs that refer to the introduction of the ECA in 2005, and creation of a converged regulatory authority in 2000.
- c. Furthermore, the attempt to link the “*silo approach*” to the creation of a digital divide in the future is nonsensical. Such a divide already exists and it did not follow from any “*silo approach*” to regulation, by which we assume the drafters of the Paper mean that broadcasting was regulated separately from telecommunications and post. South Africa is a capitalist economy, driven by the need to return value to shareholders. Without proper regulatory intervention regardless of the sector (or “*silo*”), commercial operators and indeed even state-owned companies have had no incentive to cover underserved areas, or to fulfil universal service obligations. This is so the world over.
- d. Regulation and the digital divide may well be linked, but they are linked because regulatory authorities have failed to put in place proper regulatory interventions such as universal service obligations and the Universal



Service and Access Agency of South Africa (USAASA) has arguably failed to make funds available to improve communications (as this term is defined in the Paper) in rural or semi-rural areas.

- e. On page 11 there are 5 bullets that ask what sort of policy is required to achieve certain objectives. Cell C considers that these bullets should also take into account the relationship between this sector and other infrastructure sectors, in addition to the public sector, health and education sectors. The promotion of world class communications infrastructure and idealistic policy goals for the ICT sector alone will not realise tangible benefits for South Africa. To address the ICT sector in isolation will not assist in promoting the National Development Plan.
- f. Cell C recommends that this Framing Paper take note of the provisions of the Constitution requiring co-ordination and co-operation between organs of state at all levels, and actively pursue this.
- g. Finally, although section 2 states that each of the phases will be guided and informed by ongoing consultation, discussion and engagement with stakeholders, the process does not make explicit whether or not there will be public hearings. The impact on the industry will be so significant that Cell C considers it imperative to include public hearings in the review process.

2. Purpose of the Paper (sections 3.3 and 3.4))

- a. Section 3.3 contradicts what is said in section 2 and section 3.2 (top of page 11). In our view it is critical to evaluate delivery to date even in the Framing Paper, perhaps especially in the Framing Paper.
- b. Developing goals and objectives that are realistic, appropriate and pragmatic necessarily involves assessing historical achievements and the current position in Cell C's view. For example, without acknowledging that there has been regulatory failure and identifying the reasons for this, how



can one set an objective in this regard? One might end up setting an objective for the regulatory authority that is not capable of achievement because current issues have not been addressed.

- c. One of the current issues identified in the consultation on the ICASA Amendment Bill, for example, was the way that ICASA and the Minister liaise with one another, and what is expected from this relationship in future. The closer working of these two entities would seem to us to be a critical objective of any future policy for the sector.
- d. Similarly, the purpose section does not make it sufficiently clear in Cell C's view as to whether or not the Review will consider only policies and laws that are promulgated by the Minister or enforced by ICASA. For example, the Regulation of Interception of Communications and Provision of Communications-Related Information Act (RICA) is enforced by the Department of Justice but has a significant impact on the ICT sector. In addition, the ICT sector Codes of Practise published by the Department of Trade and Industry (dti) have to be applied by ICASA, but are not administered by the Department of Communications. There may therefore be an overlap and/or conflict between the Policy and provisions that already exist in other legislation.
- e. Cell C recommends that this Framing Paper contain a complete list of all the current policies, procedures, Acts and Regulations that will form part of the Review.
- f. Also of critical importance is the role of the "public interest" in any future policy. Although it may be implied in the Framing Paper, Cell C recommends that the promotion of the public interest be specified as one of the most fundamental underlying objectives, with examples of what this might mean. Section 2 of the current ECA begins with a statement that the regulation of the sector requires that ICASA take the various subsections into account "in the public interest". Cell C believes it would be helpful and indeed necessary to include a section on how the Policy Review will take



the public interest into account and what factors might be considered to form part of the “public interest”.

- g. For example, reasonably priced communications, transparent and accountable regulation, joined-up working between Departments in the interests of this important sector, and appropriate application of public funds, might all be considered to form part of the “public interest”. Cell C has given thought to this important principle in many of the submissions made to the Department and ICASA and would be willing to engage further with the Panel in this regard.

3. Proposed policy principles (section 3.5)

- a. As mentioned in (f) and (g) immediately above, Cell C is of the view that the public interest should form part of the policy principles. This is not explicit in this section.
- b. Cell C would like to engage with the Panel further on this section. In our view it omits basic observations which must form the starting point for any policy review process. As we have indicated above, without recognising the deficiencies or inadequacies as the case may be, of present circumstances, setting idealistic policy goals will likely be thwarted by practical and legal challenges. Without electricity, is it possible for operators to cover rural villages? Even if this problem is solved by generators or solar power, without maintenance and ongoing monitoring, network infrastructure may be at risk of theft or simply falling into disrepair, being affected by weather, or tampering by persons who are not properly trained.
- c. Whilst it is obviously ideal to strive for a goal like that of promoting arts and culture, we believe the most basic needs of all South Africans should be recognised and a plan prepared in this regard as a priority. The plan could be prepared in a series of phases that deal with basic needs and then more advanced goals, over time.

4. South Africans have a right to freedom of expression (3.5.1)

- a. At bullet 4 this principle encapsulates an objective which refers to the “Public Access to Information Act”. We presume this should read the Promotion of Access to Information Act, 2000 (PAIA)? If this is correct, it is our view that PAIA already captures the concept of access to publicly held information.
- b. By including this objective within the Policy some overlap and accordingly confusion may result. There may even be a conflict between the provisions and requirements of the two, which would be undesirable. We suggest that the reference to PAIA is unnecessary and should be omitted, alternatively it should simply be recognised as being applicable to the sector.
- c. It is not clear to Cell C how the first bullet point could be implemented in practise. It could be possible to read this to include a review of devices, or regulatory obligations, or public opinion. We are concerned that the ordinary public should be consulted on this and on the type of content that they may wish to access and how this would be useful to them.
- d. The 5 bullet points set out in this section that refer to obligations on “*Government, the regulator and service providers*” should be given effect to in our view, regardless of the shape or form of policy in future. If an entity (or licensee) is physically in control of content then access can be mandated for persons with physical disabilities. However such an obligation would be inappropriate for an entity that provides hosting services, for example. Cell C is unsure what is envisioned by the policy in this regard in practise – can the physical attributes of a provider or assets over which a provider has control really be ignored in applying these policy goals?
- e. Cell C does not believe that this set of questions is appropriate to give effect to the right to freedom of expression. In our view, the right to access information is not the same as the right to express one’s self and there is no “right” to be entertained, but merely a reasonable expectation. We believe



that the content of this section would be better-placed within the next section.

5. South Africans have a right to access a diverse range of content (3.5.2)

- a. As set out above, we see little difference in practical terms between this section and section 3.5.1.
- b. It is more common, in fact perhaps only common for this sort of principle to apply in relation to media (traditionally known as broadcasting). The European position was first articulated in the Television Without Frontiers Directive which has been reiterated and amended in the Audio-Visual Media Services Directive. These are not directly related to infrastructure or networks such as would be operated by electronic communications service licensees or electronic communications network service licensees.
- c. Cell C believes that access to diverse content is a worthy goal, but it is unclear how this obligation could be applied to transport providers such as electronic communications network licensees. If such a licensee were to provide content in addition to controlling network infrastructure, the obligation would apply to the content sent over that network and not the network architecture.
- d. An over-arching principle that commits to the provision of diverse content and then considers how this might be applied in practise, would be useful in this section.

6. South Africans have a right to access a broad range of information, opinion and news of relevance to their communities and lives (3.5.3)

- a. Cell C does not agree that the right to a free media and to receive and impart information equates to a right to access in the physical sense of this word. "Access" means being able to demand information from a specified or preferred source. It seems to us that this may be somewhat impractical, particularly given the commercial imperatives of licensees.

- b. This is a laudable policy goal but it should ideally contain some indication of how it might be achieved. As presently phrased, mobile communications operators could be required to give access to news. If these operators do not control content or make content available themselves, this may not be necessary or appropriate.
- c. Cell C does not believe that it is necessary to distinguish this principle from those set out in the previous 2 sections – it overlaps with the principle that access to information of all kinds should be made possible, but it is not appropriate in our view, to oblige transport providers to do this.

7. South Africans have a right to quality communication infrastructure and services which enable economic growth, employment and wealth creation (3.5.4)

- a. Cell C agrees entirely with paragraphs 1 and 2 but is unclear what is meant in paragraph 3, specifically in the sentence “*This expanded role can only be sustained if opportunities are shared on an equitable basis*”. Again it is our view that without an indication of how this might be achieved, it is possible to read in to this section that nationalisation is envisaged, which would be extreme, alternatively that all operators should be subjected to universal service goals without any form of subsidy, or incentive, which runs counter to practise and existing law.
- b. If the Policy were to be implemented in this form, we are concerned that South Africa may face withdrawal by several international investors.
- c. Similarly, it is usually the role of government to create jobs. Commercial enterprises such as private companies can only create jobs where there is a real need, or they will be inefficient, over-staffed and ultimately lose money – they may even fail which means that the jobs that they were providing will be lost entirely.



- d. Cell C's view is that the Policy must be realistic when considering who is best-placed to achieve certain national goals. It is not the private sector on its own or even for the most part that can achieve this without public sector support.
- e. In addition, these goals are addressed in other legislation and policies, including the ICT Sector Code issued in terms of the Broad-Based Black Economic Empowerment Act, 2003 (BBBEE Act), which Code was gazetted in June 2012. The Sector Code includes provisions that promote the objectives of the BBBEE Act, actively promote access to ICTs; advance economic and social transformation in the ICT sector, contribute to the reduction of poverty and unemployment, foster equity and provide an enabling environment for all South Africans.
- f. Matters that relate to ownership and control and economic growth, employment and wealth creation should therefore remain in the BBBEE Act and Sector Code to avoid confusion and what might then amount to unnecessary and wasteful duplication of resources.

8. South Africans have a right to benefit from the ability of the communications sector to facilitate social development and improve the quality of life for individuals and communities (3.5.5)

- a. As we have mentioned above, promoting social development is already an objective of the Sector Code under the BBBEE Act.
- b. Matters relating to social and economic development are not the main focus of a regulatory authority, except peripherally and nor should they be, other than peripherally.
- c. The regulatory authority should be focussed on the regulation of this important sector with a view to improving customer experience, addressing other important sector objectives such as quality of service, coverage, access (as we have explained this above) and appropriateness of content.

- d. Cell C agrees with the provisions of the 3 bullet points at the top of page 18, but we do not agree with the provisions of the next paragraph in relation to “*facilitating improved public service*”. This is because there are numerous state-owned companies that can fulfil this role. The private sector is not able to remedy defective governance or address functions or duties of the public sector.
- e. Without mentioning proper incentives and confirming that what may apply could be reasonable and proportionate obligations, this paragraph and the one below could be read to suggest that the role of the private sector is to carry out public functions. ICT does have a role to play, but the Policy should articulate this with reference to the methodology for implementation. The 7 bullet points are appropriate principles, but without further explanation the implication could be that these will form obligations on licensees.
- f. If this is the intention then Cell C believes this is likely to render the sector unattractive to new investment, and new entrants and smaller operators will be likely to fail if they are expected to carry this burden without any corresponding benefit. The purpose of a new sector policy is not only to reflect back to the public and to government some of the social, economic and political objectives of a developmental state, but to highlight the factors that bear on and are important to the sector, as well as defining the manner in which these goals and objectives will be attained.
- g. We will deal in more detail below with the gaps in this Framing Paper as far as what the sector can expect as well as what is expected from the sector.

9. South Africans have a right to celebrate their cultural heritage in the language(s) of their choice (3.5.6)

- a. As stated above, Cell C believes that the Framing Paper has begun with a solid foundation but the continued emphasis on the rights of the public as opposed to the rights of the sector may dilute the good work that has been



done. The “rights” articulated in this section are more appropriate for a political mantra than they are for a sector policy in our view.

- b. The second paragraph in particular is unfortunately misconceived. It states that “*The departure point is that the communications infrastructure in South Africa exists not only to provide information and education, but also to meet cultural needs of South Africans*”. We are sure that multinational investors bringing foreign direct investment to South Africa will not find this comforting or appropriate and are unlikely, in our experience to want to invest in a country that does not recognise the difficulty of building and operating a technologically superior network in order to provide quality communications services to customers.
- c. The Framing Paper at this point seems to wander into areas that are not focussed on the need for regulatory support for competition to advance the public interest, the need to monitor and control content to ensure that children are not exposed to inappropriate content, and the need to ensure that our networks are safe from cyber hacking, for example. The reality of the challenges faced by licensees in South Africa are not recognised this section of the Policy.
- d. We believe the Paper is attempting to focus on the issues set out in the questions at the end of this section, but the section content is not aligned with the investigation. The principle set out here is more appropriate to the broadcasting sector (defined in any modern or traditional way).
- e. In the “*new multi-channel, multi-platform environment*” the Paper should recognise the challenges in achieving this goal, being but one of the many goals that a South African ICT Policy should address. The section is not adequately balanced between reality, goals and implementation in Cell C’s view.



10. South Africans have a right to equal universal access to communications service and infrastructure (3.5.7)

- a. The term “universal access” was defined by the Minister in Determinations in 2010. These Determinations have not been given effect to.
- b. The Policy cannot take this aspect further without considering an appropriate definition of this term in the South African context. The 2010 Determinations may be a good place to start and we suggest that it would be appropriate for the Framing Paper to recognise this.
- c. Cell C requires more information as to how exactly the “*skewed development of the past*” has impacted the sector in its present form before we can comment meaningfully on this section. In our view, the applicable laws and regulations have eradicated racial divisions and to the extent that there is a digital divide which we do not deny, this is a result of many failures both by commercial entities and government, as well as pure economics. The Framing Paper should, in our view, also recognise these issues.
- d. The use of terms such as “*rich and poor*” is disappointing, as is the reference to those “*disadvantaged by gender, disability or lack of literacy*”. What is meant here and how is the ICT sector going to – through the Policy – remedy these problems? It would appear from the paragraph that introduces the bullet points that the Paper is aimed at obligating members of the ICT sector “*to ensure universal access and service to infrastructure, services and content*”.
- e. The use of these somewhat emotive terms coupled with the implication that it is for licensees to make these things right is not appropriate for a Policy and will again have the perhaps unintended consequence of driving investment out of the sector. Cell C implores the Panel to refrain from this sort of value judgement and implication that somehow the problems can or will be resolved by licensees alone.

- f. Cell C repeats that the Determinations by the Minister in 2010 are a useful starting point for defining targets and/or obligations in relation to universal service and access and suggests in the strongest possible terms, that the role of USAASA be considered in this section of the Paper.

11. All sectors of the population have a right to equally enjoy and benefit from communications services (3.5.8)

- a. Cell C considers this principle to have been addressed in existing laws and policies, except that as we have indicated above, ICASA should have a role in relation to determining whether content is appropriate particularly where minors are concerned. International trends suggest that this is a regulatory role and we believe the fundamental difference in the present ICT sector compared to any previous snapshot of the sector, is content.
- b. Communications are in many ways, utilities. Traditionally telecommunications and postal services were treated as utility services along with electricity and regulation was addressed at maximising and protecting the use of scarce resources and ensuring affordable access to the utility service.
- c. Universal service in many countries has ceased to exist because the basic concept has achieved what was intended, basic access to a utility. In South Africa this concept may need to be revised to ensure that basic access to enhanced communications such as the internet and broadband is achieved.
- d. The Paper could recognise this aspect, rather than suggesting that the sector should be "*responsive to all segments of the population*", which in our view has little practical meaning. Instead this section could be phrased so as to indicate that the sector should operate in a way that takes the interests of consumers and the broader public interest into account (having regard to what we say above about the public interest).

12. South Africans are entitled to communication services that reflect, respect and uphold constitutional and community standards and values (3.5.9)

- a. This principle seems to overlap with the principles that have been enunciated regarding the freedom of expression, right to privacy and to protection of personal information, and the right to diversity of views and content.
- b. As a result the principles could be merged in our view, with the caveat that it will be difficult to define "*constitutional and community standards and values*". It is our view that some benchmark should be included in this regard as otherwise this is too broad a set of standards and values.
- c. The role of the Film and Publications Board should be expressly considered. This entity falls under the purview of the Department of Home Affairs. We see no reason why its role should not be subsumed within the ICASA functions and powers, as this would bring content and protection of children within the ICT sector.
- d. Cell C does not understand the meaning of the question "*How should policy ensure that communications services reflect, respect and uphold laws and agreed on standards and values in the future, without encroaching on the rights of South Africans to freedom of expression?*" It would seem that the question makes an assumption that to reflect, respect and uphold laws and standards and values would mean an encroachment or limitation of the right to freedom of expression. It is by no means clear to us that the two are relevant or exclusive when viewed in the context of sector policy.
- e. First, the law must be upheld, this is sacrosanct and independent from any other provision. Second, we do not know what is meant by "*agreed on standards and values in the future*" and respectfully submit that we cannot possibly know what values will be agreed in the future. We therefore assume that what might be meant here is that laws must be flexible to deal with changing technology. However, laws reflect the value system of the

day – they can only foresee the future to a certain extent. Laws will have to be changed if value systems change to such an extent that the laws are no longer appropriate for the circumstances. Third, we have already explained above that we do not consider the communications sector to be rights-based. There is no literature that supports this view to our knowledge.

- f. As noted above, content and transport must be distinguished from one another. Whilst content may reflect the rights or may consist in the recordal of the exercise of certain rights, content is not a right in itself. Transport cannot be considered to be a right either.
- g. Cell C heartily agrees with the view, phrased as a question, that there is a need to promote media literacy and education of users and audiences. However, this must also be promoted by other sectors, including education, and trade and industry, and labour. Licensees may be obliged, as part of an agreed universal service obligation, to conduct training or to contribute to skills development – in fact, licensees already contribute to these endeavours in various ways. Media literacy is a public sector responsibility in the main and should not be imposed solely or mainly on the private sector.
- h. Finally, it cannot be the role of a policy framework to protect rights in any circumstances within the context of the ICT sector. It is Cell C 's view that policy is a broad statement of intent, it is not a mechanism from which protection of rights can be inferred or should be expected.

13. South Africans have a right to privacy and protection of personal information (3.5.10)

- a. Cell C is concerned that the Review again appears to be concerned with matters that are already dealt with in other laws and policies. As soon as the Protection of Personal Information Bill is passed into law, South Africans will have extensive rights in relation to privacy and the protection of personal information. This aspect should not be dealt with in the sector review or we



may find that there is overlap, duplication or confusion between the various arrangements.

- b. Cell C is of the view that no specific focus is needed in the Policy Review. Again we reiterate that the sector policy should not be mainly or only focussed on “rights”, particularly when these are already addressed in other laws.
- c. Cell C does consider it appropriate however to include RICA in the ambit of the laws that the Review might consider, for the reasons set out above.

14. Government has a responsibility to maximise the overall public benefit derived from the use of public resources (3.5.11)

- a. Cell C supports this notion. Our comments above in relation to the public interest are relevant to this point.
- b. Cell C believes the Framing Paper should identify those public resources which are to be addressed. As a minimum these should include land, rights of way, spectrum and numbers. However it would be appropriate to also consider assets that sit with state-owned companies (including rights of way) to which other private sector entities cannot gain access except by negotiation. In particular Cell C believes the Paper should consider how to deal with essential facilities.
- c. The factors set out in the 2 bullets in this section are not necessarily compatible. Social considerations and economic considerations are often at odds and one must be prioritised over the other. The Paper does not recognise this fact and importantly does not suggest an approach to reconcile the differences between them.
- d. As we have outlined above, investors will be concerned to note that “*maximum public value*” has been included here as a determining factor in



the allocation of these important resources, without explanation. It would appear from the last paragraph of this section that technological imperatives or needs are not considered in this regard, although the questions do suggest that “*technological advances affect considerations underpinning spectrum governance.*”

- e. It is absolutely critical in our view that the limitations of spectrum are acknowledged in any allocation process. For example, the ICASA process proposed in 2011 was potentially flawed in that it did not explain what was meant by “wholesale open access”, and this is capable of several interpretations which may be incompatible depending on what bands of spectrum are made available and to whom.

15. All South Africans are entitled to a quality communication system that facilitates innovation, fair competition and equitable treatment of all role players (3.5.12)

- a. Cell C disagrees with the conclusion that quality communication systems can be likened to or compared to equity and equality of opportunity. The attempt to frame the sector within the context of human rights and the Constitution is not appropriate in our view. The sector stands on its own feet, the Constitution applies to it as it applies to every sector and to every person, but the sector is not about Constitutional rights.
- b. Matters related to competition are addressed in the Competition Act, 1998 and to the extent that ICASA also has rights and duties to regulate the sector so as to achieve fair and sustainable competition, the laws already recognise the need for a concurrent jurisdiction agreement and provision is made for this to be put in place.
- c. The Promotion of Administrative Justice Act, 2000 addresses the notion of effective and efficient processes and institutions, as do several other public sector laws such as the Public Finance Management Act and Municipal Finance Management Act. The regulator is governed by the ICASA Act.



- d. If the purpose of this section is to establish whether or not existing laws are effective then it should say so.
- e. It is entirely unclear how private sector companies can ensure that bullet 2 (skills and capacity building) is achieved, other than by contributing as we currently do, to skills development by paying a levy, and by training up staff through our internal education programmes. We do not know what is meant by "*relevant and responsive to South African circumstances*" since this phrase is capable of several widely varying interpretations. We therefore cannot comment on this constructively.
- f. The two concepts captured in the last bullet, namely customer-oriented and technology-neutral services, are two very different things. The customer is independent of the form of delivery – the customer is a recipient of service regardless of how it is provided. Technology-neutral services is a term of art, coined to describe the fact that technology now allows delivery of the same or many services over one or various platforms. Cell C does not believe it is appropriate to link the two in this section.
- g. The objective is therefore diluted by the confusion in the content of this section. It is therefore not possible to comment on "*other goals*". Cell C can assume that what is meant is that the consumer interest should be promoted. This can be achieved by ensuring fair competition so as to enable provision of a wide variety of reasonably priced services (as set out in section 2 of the ECA). However the reference to technology-neutral services and quality systems should be removed and included in another section dealing with technology-specific issues.
- h. Equitable treatment of all role players is also difficult to unpack so as to provide reasoned comment. Role players in the ICT sector could include consumers, device manufacturers, service providers, satellite operators, equipment designers, ICASA, MDDA, the public sector (and within this sector, any of the 3 spheres of government) and the private sector including



businesses that rely on communications or that transmit broadcasting signals. It is impossible to understand and comment on this provision since it is impossible to know why ICASA and a device manufacturer for example, deserve “equitable treatment”.

- i. Insofar as the Competition Act and ECA already deal with competition matters, and the protection of consumers is addressed extensively in the Consumer Protection Act, 2008 (CPA). We suggest that the Paper could require that ICASA review its regulations to ensure that they support existing laws and policies under these Acts. If this section is intended to address handset subsidies, then it should indicate by way of example, what the challenges are that may need to be addressed because they are not addressed at all or adequately under the existing regime.

16. South African citizens and consumers are entitled to maximum transparency in how services are delivered and conditions under which they are delivered (3.5.13)

- a. Protection of consumers is addressed extensively in the CPA as indicated in the paragraph above. Consumer protection as far as electronic transactions are concerned is also addressed in the Electronic Communications and Transactions Act, 2002. Service providers are expected to act in a manner that will afford consumers as much information as they need to make reasoned decisions. The CPA also deals with complaints, disputes, records and prices.
- b. Cell C agrees, however, that transparency of pricing in the ICT sector is absent. Although consumers have a right to request this under existing legislation, it would appear that the enforcement of that legislation is not effective at present, since the hundreds of packages available for example in the electronic communications sector, are difficult if not impossible to compare to one another because of the varying conditions that apply to each. It is accordingly difficult to determine whether or not a particular package offers value for money. It is also difficult for smaller operators such



as Cell C to compete on price when the prices charged by dominant operators such as MTN, Telkom and Vodacom are opaque – there is for example, a difference in the price charged to consumers for on-net and off-net calls.

- c. Cell C encourages the education of consumers about their rights to demand more transparency on prices. To the extent that ICASA considers that this element is not adequately dealt with in other legislation, ICASA is empowered to protect consumers by regulation under the existing sector laws. If the Panel's review considers that those laws are not adequate to achieve this purpose, then the Paper should identify this as a lacuna which the Review can address in future policy initiatives.
- d. We reiterate the importance of assessing the status quo prior to embarking on the exercise to produce a Framing Paper.

17. South Africans have a right to an environment that is not harmful to their health or wellbeing (3.5.14)

- a. Cell C acknowledges this fundamental right as espoused in the Constitution. It is unclear what role it should play in the ICT sector.
- b. The Department of Health has conducted a study in line with international studies of a similar nature to determine whether or not there are adverse effects on health from the use of cellphones, for example. The Minister has recognised this study.
- c. We support the principle that the King reports have long enunciated, namely that corporate entities (which includes state-owned companies) should take account of the needs and wellbeing of their "stakeholders". This is part of good corporate governance. Companies are already accountable under these principles.
- d. Cell C is also aware of and compliant with the requirements of the Department of Environmental Affairs and Tourism as regards the erection of



masts. As a licensee building out infrastructure, Cell C and other licensees must also comply with the regulations and policies of local government, municipal government and provincial and national government, many of which take environmental factors into account in granting or refusing rights of way, or rights to construct infrastructure.

- e. Cell C does not consider it appropriate for the Framing Paper to dwell on these matters. It is sufficient in our view, to recognise that these matters are factors that affect the sector.

18. Cell C's additional views (section 4)

- a. Cell C notes that the Panel seeks views on principles but not their application. We do not believe that we can comment effectively without linking the two.
- b. A policy framework must be based on something. Over time, many policy frameworks have been based on “first principles”, those espoused in the World Trade Organisation’s Treaty, which have stood the test of time. These include:¹
 - i. Competitive safeguards - Appropriate measures will be implemented to avoid any anti-competitive conduct on the part of the suppliers (licensees), including, but not limited to, anti-competitive cross-subsidization and anti-competitive use of sensitive information, such as technically or commercially relevant information for a rival to provide services.
 - ii. Interconnection – Interconnection has to be ensured and provided “at any technically feasible point in the network”.² Furthermore, interconnection needs be provided under non-discriminatory conditions and rates, in a timely fashion, under transparent and cost-oriented rates and with no bundling requirements. Interconnection

¹ See the Reference Paper to the WTO, Council for Trade in Services Special Session, TN/S/O/ARE, 4 July 2005, Annex A (24 April 1996).

² WTO 1996 Reference Paper, Para.2.2.



- negotiation and arrangements have to be transparent and publicly available. Suppliers will have recourse to an independent body for dispute settlement.
- iii. Universal service –Member states are allowed to define universal service obligations as long as they are transparent, non-discriminatory and competitively neutral.
 - iv. Public availability of licensing criteria – Where licenses are required, the terms and conditions of individual licenses and the licensing criteria have to be publicly available.
 - v. Independent regulators - The establishment of a regulatory body that is “separate from, and not accountable to, any supplier of basic telecommunication services”.³
 - vi. Allocation and use of scarce resources – Procedures for the allocation and use of scarce resources will be carried out in an objective, timely, transparent and non-discriminatory manner. Information regarding spectrum allocation will be made publicly available.
- c. **These** do not reflect the basic principles of broadcasting, but here we believe that the White Paper on Broadcasting published all those years ago following CODESA and the Triple Inquiry on Broadcasting, still contain some truths that should form the basis of any forward-looking review. Read together with the basic principles applicable to traditional telecommunications, the point of departure for this review should be to ask questions such as did we achieve these important goals, how did we fail, why did we fail, are these truths still valid?
- d. The nature of a policy also deserves consideration in the Framing Paper. Regulation exists for particular purposes and not of and for its own sake. In

³ WTO 1996 Reference Paper, Para.5.



an emerging telecommunications market, regulation may, for example, be necessary to:

- i. allocate scarce resources on an equitable basis, particularly frequency spectrum, and number ranges;
- ii. allow fair access to “essential facilities” defined as an infrastructure or resource that cannot reasonably be duplicated and without access to which competitors cannot reasonably provide goods or services to their customers. These facilities might include landing stations, parts of the fixed line networks, local loops, rights of way, and high sites;
- iii. ensure interoperability of networks and services;
- iv. ensure fair competition between operators with significant market power and other operators and service providers;
- v. protect consumers in a market in which there is no true competition, by regulating quality and terms of supply and by capping prices; and
- vi. ensure that consumers can readily switch between service providers.

These may be old-fashioned issues, but even the current draft Framing Paper recognises that they still apply.

- e. The starting point for the development of a legal and regulatory framework for communications is to determine a policy for the sector. The policy will lay down the immediate, medium and long-term objectives of the Government. The Policy should inform and shape the legal and regulatory framework for telecommunications, which comprises the law and subordinate documents and regulatory tools.

Yours faithfully

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