GENERAL NOTICE

NOTICE 212 OF 2009

Independent Communications Authority of South Africa
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FINDINGS AND CONCLUSIONS DOCUMENT ON THE INTERPRETATION OF THE DEFINITION OF UNDER SERVICED AREA AS DEFINED IN THE CELL C LICENCE

1. INTRODUCTION

1.1. In terms of its Mobile Cellular Telecommunications Service (**"MCTS"**) licence, Cell C is obliged to roll out 52 000 Community Service Telephones (**"CSTs"**), within a period of 7 (seven) years reckoned from 17 November 2001 and 17 November 2008[1]. Cell C is required to submit to the Authority its roll out plans prior to the deployment of such CSTs in Under Serviced Areas (**"USAs"**) that it (Cell C) has identified for such purposes.

1.2. During July 2003, Cell C submitted its proposed roll out plans for approval by the Authority. The roll out plans were initialiy rejected by the Authority on 19 August 2003 and the underlying reason therefor was that the data submitted by Cell C in support of its roll out plans was in the Authority's view inadequate to assist the Authority in the evaluation of compliance of the Cell C roll out with Cell C's Universal Service Obligations (**"USOs"**) as stipulated in the Cell C licence. In response

[1] Clause A.2, Annexure A of Cell C Licence

thereto, Cell C contended that it was not able to provide the data in the manner required by the Authority as it (Cell C) had not been successful in procuring the co-operation of Telkom, which it (Cell C) thought was the only party in a position to provide it with the required data. The Universal Service Agency (USA), now known as the Universal Service and Access Agency of South Africa (**"USAASA"**), also did not have the data readily available.

1.3. Notwithstanding the lack of further data, as earlier required by the Authority, the latter subsequently approved the Cell C roll out plans it had previously rejected. MTN, an MCTS licensee which is in direct competition with Cell C in the mobile cellular market, took on review before the Johannesburg High Court the Authority's decision to approve the Cell C CST roll out plans for, amongst others, the following reasons:

1.3.1. By the time the Authority approved the Cell C CST roll out plans on 18 September 2003, it was already ***functus officio*** as it had previously rejected the same roll out plans on 19 August 2003 based on the same information which formed the basis of the subsequent approval; and

1.3.2. That Cell C had deployed a number of its CSTs in areas MTN contended were not USAs as contemplated in the Cell C licence.

1.4. On 26 February 2007, the Johannesburg High Court handed down the judgement, reviewing and setting aside the Authority's decision of 18 September 2003. The Court however left open the issue of the interpretation of the definition of USA as contemplated in the Cell C licence. In his judgment, Joffe J observed as follows:

"[the applicant and the second respondent differ in their interpretation [of an under serviced area]"[2].

[2] Per Joffe J. in MTN v Cell C and ICASA 2007 paragraph 12 (unreported)

"Although invited to determine the meaning of the definition [of an under serviced area], it is not necessary for the purposes of this judgement to do so"[3].

1.5. The judgment in the circumstances dealt with a peripheral issue that relates to approval by the Authority of the Cell C CST roll-out plans and avoided the issue central to the dispute between the two MCTS licensees, that is, whether or not any of the Cell C CSTs are located within an USA and consequently whether such units are CSTs as defined in the Cell C licence. It is for this reason that the matter has again landed on the Authority's lap and, hence, the inquiry in terms of section 4B of the ICASA Act, 2000 (Act No. 13 of 2000) (**"the ICASA Act"**).

1.6. Taking into account that the decision of the Authority on the CST roll out plans submitted by Cell C may materially and adversely affect the rights of other MCTS licensees and other interested parties, prior to taking a decision on whether or not Cell C has complied with its USOs to roll out the specified number of CSTs by 17 November 2008, the Authority decided to afford an opportunity to interested parties to submit written representations and to hold public hearings on the interpretation of the definition of under-serviced area in the Cell C licence, in accordance with the provisions of section 4B of the ICASA Act.

1.7. The purpose of the inquiry is primarily to assist the Authority in arriving at a definitive interpretation on the definition of an USA as contemplated in the Cell C licence so that a determination as to whether or not Cell C has complied with its USOs as set out in the Cell C licence can be made.

[3] Per Joffe J. in MTN v Cell C and ICASA 2007 paragraph 13 (unreported)

2. LEGISLATIVE FRAMEWORK

2.1. Section 4B of the ICASA Act endows the Authority with powers to conduct inquiries into various matters. The said section 4B provides thus:

"(1) The Authority may conduct an inquiry into any matter with regard to:-

(a) the achievement of the objects of this Act or the underlying statutes;

(b) regulations and guidelines made in terms of this Act or the underlying statutes;

(c) compliance by applicable persons with this Act or the underlying statutes;

(d) compliance with the terms and conditions of any licence by the holder of such licence issued in pursuant to the underlying statutes; and

(e) the exercise and performance of its powers, functions and duties in terms of this Act or the underlying statutes.

(2) The Authority must, in the Gazette, give notice of its intention to conduct an inquiry and such notice must indicate the purpose of the inquiry and invite interested persons to:-

(a) submit written representations within 60 days from the date of publication; and

(b) indicate in their written representations whether they require an opportunity to make oral representations to the Authority".

2.2. Section 2(1) of the ICASA Act is a further legal basis for the inquiry held by the Authority. This section provides that the Authority has been established to regulate electronic communications in the public interest[4] and to achieve the objects of the underlying statutes[5], which include the Electronic Communications Act, 2005 (Act No. 36 of 2005). The Authority is of the view that the inquiry held by the Authority is undoubtedly a matter of public interest, which the Authority is desirous to address.

2.3. In order to discharge the above objects, the Authority has appointed a committee in terms of section 17 of the ICASA Act, 2000 (Act No. 13 of 2000). One of the tasks of the committee was to prepare the relevant Discussion Document, publish it in the Government Gazette and extend an invitation to interested parties to comment thereon. The Discussion Document was published in the Government Gazette No. 31031 dated 6 May 2008 seeking public input on the meaning of the definition of "USA" as set out in the MCTS licence of Cell C. The Authority received five written representations from Telkom, Vodacom, MTN, Cell C and the USAASA. Although Neotel did not submit substantive representations to the Authority, it reserved its right to file representations at a later stage in the event the present inquiry were to address the future definition of "USA".

2.4. The committee afforded an opportunity to interested parties to make oral representations in public hearings held on 6 and 8 October 2008.

3. ANALYSIS OF WRITTEN AND ORAL SUBMISSIONS PRESENTED ON THE DISCUSSION DOCUMENT

3.1. It is noted that the conventional way of analysing submissions is to deal with each submission received in its totality. However, for the purposes

[4] Section 2(1)(b), ICASA Act
[5] Section 2(1)(c), ICASA Act

hereof the Authority will depart from this convention and rather deal with each question raised in the Discussion Document followed by an analysis of each party's submission in respect to the question posed. The Discussion Document raised eight pertinent questions and in analysing the submissions the order followed in the Discussion Document will be adhered to. The analysis of all the questions raised follows hereunder.

3.2. **DO YOU AGREE WITH THE AUTHORITY'S VIEW THAT ONLY AN OFFICIALLY DEFINED AREA, AS PER STATISTICS SA, IS ACCEPTABLE?**

TELKOM

3.2.1. Telkom concedes that currently there is no consensus within the industry on the definition of "under serviced areas" due to a variety of complex factors. Telkom maintains that an operational definition has to at least take into cognisance the political, social and economic factors that exist in the South African environment[6]. It is Telkom's view that the definition of under serviced area" regards the municipality or an officially identifiable suburb of a city or town or a municipally defined section, ward, zone of a township or sub-place name within a city as integral to the definition[7]. Telkom is of the view that the Statistics SA data upon which the Authority proposes to rely should be aligned to the legislative framework as set out in various municipal legislation such as the Municipal Systems Act, 2000 (Act No. 32 of 2000) ("Systems Act") as well as the Municipal Demarcation Act, 1998 (Act No. 27 of 1998) ("Demarcation Act"), specifically the definition of a "community" as contained in the Systems Act[8].

[6] Telkom's written submission at page 2
[7] Telkom's written submission at page 2
[8] Telkom's oral submission line 10 at page 7 of the public transcripts dated 6 October 2008

3.2.2. Telkom assumes that the methodology adopted by Statistics SA takes into account the geographic mapping and demarcations into enumeration areas and contends that it is important to ensure that the methodology is similar or not far removed from that contemplated in the Demarcation Act. Telkom concludes that it would be easier to evaluate the impact of the under serviced areas on the living standards of the South African population rather than per geographical area, particularly where it concerns the disadvantaged groups[9].

VODACOM

3.2.3. It is Vodacom's view that the definition in general, including the phrase "any part thereof", is vague and renders the areas purportedly falling under the definition objectively indeterminable. Vodacom contends that the manner in which the definition is worded opens itself to a wide and potentially abusive interpretation, with the result that areas that are objectively adequately served may be included under the ambit of the definition[10]. Vodacom agrees with the Authority's proposal that the phrase "any part thereof" be construed to mean "a municipally or other officially demarcated area". It is proposed by Vodacom that the phrase "human settlement" be deleted from the definition of "under serviced area" and be substituted with "any municipally or other officially demarcated part thereof"[11].

USAASA

3.2.4. USAASA's view is that the definition of USA includes a wide range of geographic areas that go beyond those included in the

[9] Telkom's written submission at pages 2-3
[10] Vodacom's written submission at page 6
[11] Vodacom's written submission at page 6

findings of Statistics SA. It is proposed as a matter of practicality that the Authority must use a unit of measurement for which it has data and thus the use of Statistics SA defined areas is acceptable to USAASA[12].

MTN

3.2.5. MTN agrees with the Authority's view without reservation. MTN believes that the use of the Statistics SA Census of 2001 is the only acceptable central source of information on the description of an USA in the Cell C licence as it provides an official and comprehensive primary data source which addresses the issue directly by asking the question at the heart of the licence definition, i.e. "do you have access to a phone"[13]. It is MTN's view that there can be no better indicator than a direct statement of a person of whether or not a person has access to a telephone to derive a view of access for the purposes of the Cell C licence[14].

3.2.6. MTN contends that the lowest level at which Census household data is aggregated is the sub-place name and it is proposed that it would be proper for the access computation to be done at the lowest level of aggregation of individual household data from the Census, that is, sub-place name level.

CELL C

3.2.7. Cell C's written as well as oral representations did not address the specific questions raised in the Discussion Document. Instead, the Cell C responses are couched in general and broad

[12] USAASA's written submission at page 3
[13] MTN's written submission at page 8
[14] MTN's written submission at page 8

terms. As a consequence, it is difficult to extract their responses to the specific questions posed.

3.2.8. In this regard Cell C has not provided an answer to this question. However, Cell C's general position is that the Authority must adopt a broad interpretation that widens rather than narrows the areas in which CSTs may be rolled out[15], and which promotes equality of operation and competition between MCTS operators[16].

3.3. **DO YOU AGREE WITH THE AUTHORITY'S DEFINITION OF INHABITANTS?**

TELKOM

3.3.1. Telkom contends that there is a conflict of terminology as well as the application of the terms in clauses 3.5, 3.6, 3.8 and 3.10 of the ICASA notice. In support of its contention Telkom submits that in clause 3.5 the Authority interprets "inhabitant" to mean an individual person as opposed to a household. This, it contends, speaks to teledensity. In clause 3.6 the Authority proposes using the definition of inhabitants as captured in the Census Statistics SA 2001. In clause 3.10 the Authority proposes interpretation of access to mean the ability of the inhabitants of an area to reach and/or use a house telephone or public payphone. This Telkom contends speaks to penetration. Telkom notes that Statistics SA 2001 is silent about the definition of inhabitants[17]. Telkom sounds a word of caution to the Authority to bear in mind that there is a constant increase of population and that extensive informal settlements developed as a result of the abolishment of the influx control measures. Telkom proposes that before

[15] Cell C's written submission at pages 62-63
[16] Cell C's written submission at pages 47-51 and 69-71

reaching a conclusion on the definition of inhabitants regard must be had to the description of a "community" as defined in the Systems Act.

3.3.2. The term "community" is defined in terms of section 1 of the Systems Act as follows:

(a) comprising residents of the municipality;
(b) ratepayers of the municipality;
(c) any civic organisation and non-governmental, private sector and labour organisation that are involved in the local affairs within the municipality;
(d) visitors and other people residing outside the municipality who because of their presence in the municipality make use of services or facilities provided by the municipality.

3.3.3. Telkom believes that the above definition as well as the use of the term "inhabitant" would give a broader picture of the social and economic dilemma of the ICT landscape in South Africa and the manner in which the distribution of communication facilities should be allocated. Telkom submits that the term "inhabitant" must be used with caution taking into account the socio economic standing of an area[18].

VODACOM

3.3.4. Vodacom agrees with the Authority's interpretation of the term "inhabitants" *viz*, that it means persons who live in, dwell in, reside in or occupy a place on a semi-permanent basis and that temporary or transient population is not included[19]. Vodacom accepts the Authority's view that the use of the word

[17] Telkom's written submission at page 3
[18] Telkom's written submission at page 3
[19] Vodacom's written submission at page 7

"inhabitants" indicates an intention to refer to individual persons as opposed to households. In Vodacom's oral presentation it is pointed out that the term "inhabitants" must bear its ordinary meaning and that the circumstances that prevailed at the time of issuing the Cell C licence must be taken into account.

USAASA

3.3.5. The agency echoed the sentiments expressed by Vodacom that the term "inhabitants" should be given its ordinary meaning[20]. However in its oral presentation, USAASA is not sure whether to adopt the permanent dwelling of a population or area that is frequented or occupied on a non-permanent basis as the preferred approach in the exercise[21].

MTN

3.3.6. MTN accepts and agrees with the definition of the term "inhabitants" proposed by the Authority. It points out by way of illustration that a visitor to the central business district in order to shop for a day as well as an office worker who is employed in the central business district area who lives elsewhere is not an inhabitant of that area[22]. MTN is emphatic that the transient population should not be taken into account when it comes to determining the inhabitants of the relevant area, and contends that the term "inhabitants" means persons who inhabit the relevant area. In MTN's oral presentation it is emphasised that the term "inhabitants" should be given its normal interpretation or meaning[23].

CELL C

[20] USAASA's written submission at page 3
[21] USAASA's oral submission lines 10-12 at page 41 of the public hearing transcripts dated 6 October 2008
[22] MTN's written submission at page 9
[23] MTN's oral submission lines 4-7 at page 28 of the public hearings transcripts dated 8 October 2008

3.3.7. Cell C believes that for historical reasons most of South Africa's disadvantaged population have to commute to the economic centres of the country in order to participate meaningfully in economic activities. Yet at the same time such people do not live there as "inhabitants". In the circumstances, it contends that either the conception of "inhabitants" must be altered to accommodate these daily immigrants; or the concept of a "sub-place" must change; or taxi ranks must be regarded as community centres within which CSTs may legitimately be placed. Cell C further submits that its licence recognises the need for affordable telephone access by allowing train stations as community centres in which CSTs may legitimately be placed, even outside of under serviced areas[24].

3.3.8. Cell C argues that it is impossible for it to understand the rationale by which formal and informal taxi ranks should be treated any differently to train stations. It is argued that indeed the taxi industry forms an important and vital component of the mass transport infrastructure than do trains. It is argued further that there is simply no basis upon which, sensibly, to recognise the need for CSTs to be placed in train stations and to refuse to do so in relation to taxi ranks[25]. In a nutshell, Cell C contends that the word "inhabitants" includes commuting or transitory people and those taxi ranks must be regarded as community centres within which CSTs may legitimately be placed.

3.4. **DO YOU AGREE WITH THE DEFINITION OF PSTS ADOPTED BY THE AUTHORITY, *viz*, THAT IT EXCLUDES ANY REFERENCE TO MOBILE PHONES AND INCLUDES BOTH THE FIXED LINE ACCESS TO THE HOME AND PUBLIC PAYPHONE ACCESS?**

[24] Cell C's written submission at pages 73-74
[25] Cell C's written submission at pages 73-74.

TELKOM

3.4.1. Telkom agrees that the term PSTS in the Cell C licence excludes mobile telephony and that it refers only to fixed lines. The concern raised by Telkom, however, is that when determining the meaning of "access", both individual residential lines and access to public pay telephones are considered together[26]. Telkom raises as a concern in its oral presentation that PSTS in the licence of Cell C excludes mobile phones, however when calculating the access to fixed line both the data of the in dwelling phones as well as the mobile phones is included. This, it is contended, is somehow confusing to Telkom[27].

VODACOM

3.4.2. Vodacom fundamentally agrees with the Authority's definition of PSTS that it refers only to access to PSTS exchange lines and public payphones, excluding mobile phones. Vodacom contends that although mobile phones were not considered by the Authority at the time of defining under-serviced area for purposes of the Cell C licence, it is Vodacom's view that the definition was, at the time of issue of Cell C licence, fundamentally flawed. Vodacom reasons that in an epoch where mobile telephony penetration is 92% by SIM and almost 70% by population, it is highly questionable to determine access to telephony solely via PSTS[28].

[26] Telkom's written submission at pages 3-4.
[27] Telkom's oral submission lines 7-11 at page 11 of the public hearings transcripts dated 6 October 2008.
[28] Vodacom's written submission at page 7.

USAASA

3.4.3. USAASA refers to the definition of PSTS contained in section 1 of the Telecommunications Act, 1996 (Act No. 103 of 1996) and notes further the amendments that were effected to the Telecommunications Amendment Act, 2001 and that mobile cellular telecommunication services were specifically not included in the definition of PSTS. It contends that the exclusion of mobile phones from the definition of PSTS is sensible[29]. USAASA therefore agrees with the definition of PSTS as set out by the Authority. In its oral presentation USAASA reiterates the sentiments expressed in its written presentations[30].

MTN

3.4.4. MTN agrees with the Authority that mobile phones should not count towards the access measure relevant for the purposes of the Cell C licence. MTN points out that ownership of a PSTS line in a household constitutes a valid form of telephone access[31].

3.4.5. MTN submits that each home phone provides, on average, access to four inhabitants. MTN also agrees with the Authority that access to a nearby public payphone is an appropriate form of access for the purposes of qualifying as a serviced individual in terms of the Cell C licence. MTN submits further that access to a phone at a neighbour nearby, or at another location nearby should qualify towards a measure of access if expressed as a matter of fact by the persons concerned[32].

[29] USAASA's written submission at page 3.
[30] USAASA's oral submission lines 14-18 at page 42 of the public hearings transcripts dated 6 October 2008.
[31] MTN's written submission at page 9
[32] MTN's written submission at page 10

CELL C

3.4.6. Cell C's written as well as oral presentations have not expressly dealt with the specific question.

3.4.7. **DO YOU AGREE WITH THE AUTHORITY'S DEFINITION OF "ACCESS"?**

TELKOM

3.4.8. Telkom notes that the Authority's interpretation of "access" means the ability of inhabitants of an area to reach and/or use a house telephone or public payphone and contends that one part of the definition makes reference to teledensity and another part has reference to penetration. It notes further that the Authority's definition focuses on public telephones and residential or household telephones. Telkom concludes that there seems to be conflict of use of terminology and that this anomaly needs to be addressed before the definition is finalised[33]. It is Telkom's view that for purposes of interpreting the Cell C licence, the primary measure of "under-serviced" would be the teledensity figure. It contends that while access to pay telephones is an important determinant of service availability, its conflation with teledensity is logically and practically not advisable.

3.4.9. Telkom in its oral presentation points out that the interpretation of access using both house telephones and public payphones repeatedly portrays an inconsistency[34]. It observes that Statistics SA used both household telephones and mobile telephones to gather data, whilst the Authority excludes mobile phones to determine access. It argues that the terms

[33] Telkom's written submission at page 4
[34] Telkom's oral submission lines 2 -4 at page 13 of the public hearings transcripts dated 6 October 2008

"household" and "inhabitant" cannot be used interchangeably because they mean different things. Telkom submits that the Authority should explore use of the definition of "access" referred to in the ITU, which is forward looking and evolving and takes into account fixed as well as mobile phones[35].

VODACOM

3.4.10. Vodacom maintains that the study commissioned by the USAASA on the definition of universal service and access under the ECA, including the definition of under-serviced area is in line with the broad mandate of promoting universal service and access[36]. It is Vodacom's view that instead of initiating an inquiry focused on Cell C, it would be more appropriate for the Authority to initiate a section 4B inquiry on the definition upon completion of the study suggested by USAASA. Vodacom contends it would be useful for the Authority to await the completion of the study commissioned by USAASA, which Vodacom believes can positively shape and inform the process of formulating an appropriate and relevant definition of an under-serviced area under the ECA.

3.4.11. Vodacom argues that access as set out in the licence of Cell C ought to refer to a situation where every person has a reasonable means of access to a publicly available telephone. It further contends that access as contemplated in the Cell C licence should be understood in the context of universal access as opposed to universal service and thus all public phones, including any other means of phone sharing by the community, should be included in the measure of access for purposes of the Cell C licence. The Authority is advised to note that the census data is accumulated on the household level as opposed

[35] Telkom's oral submission lines 4 - 7 at page 26 of the public hearings transcripts dated 6 October 2008
[36] Vodacom's written submission at page 7

to the individual level. Where the head of the household has answered that he/she has access to a phone, the entire household should be deemed to have access to the phone as well[37].

USAASA

3.4.12. USAASA agrees with the Authority's proposed use of the ordinary meaning of "access". USAASA, however, urges the Authority to take into account whether that ability is meaningful if the cost is too high in order for a particular inhabitant to take advantage of it. It goes on further to argue that there is general consensus worldwide that universal service and access policies have three dimensions, namely, physical availability, accessibility regardless of the attributes of the user, such as disability, and affordability. It submits that any definition of "access" given by the Authority must take all of these three dimensions into account[38].

MTN

3.4.13. MTN agrees with the inclusion of house phones and public payphones as appropriate means of access for purposes of the Cell C licence definition. However, MTN submits that the Authority's definition of "access" at paragraph 3.10 of the notice is incomplete. It argues that the definition of "access" under discussion is not modern and forward looking. It is MTN's view that the under-serviced area definition in the Cell C licence is anachronistic and does not appropriately address the access challenges of today, and that a different process is required to

[37] Vodacom's written submission at page 8
[38] USAASA's written submission at page 4

deliver a new, modern and relevant view of under-serviced areas in 2008[39].

3.4.14. MTN agrees that there are no authoritative or commonly accepted definition of access. It is argues that the notion of access is time, geography, technology and socio-economically dependent. In other words there cannot be a definitive, international or even national, timeless definition of access. MTN refers to the ITU's 1998 World Telecommunications Development Report (WTDR-1998), which focused on the theme of Universal Access. It highlights the context-sensitive nature of access, but also emphasises a common perception that reasonable distance, rather than ownership at home was then the accepted concept.

3.4.15. MTN argues that any definition of Cell C's under-serviced area made by reference to teledensity or penetration will substantially over-estimate the under-serviced population[40]. It argues further that access in the Cell C licence should be understood in the context of universal access objective, not universal service.

3.4.16. MTN submits that any definition of under-serviced area driven by dividing phone lines in the area by the population is incorrect and reviewable. It submits that the views of inhabitants on their means of access, as expressed in the Census, are definitive and should not be replaced or discounted by regulatory fiat. It argues that reasonable access must therefore include access via phones in dwelling, payphones nearby, phones at neighbours nearby and phones at another location nearby.

[39] MTN's written submission at page 10
[40] MTN's written submission at page 12

3.4.17. MTN emphasises the point in its oral presentation that the Cell C licence is unambiguous and what is to be measured is inhabitants with access to PSTN lines, and not PSTN lines per inhabitant[41]. MTN maintains that there can be no better substitute to measuring access than the comprehensive, independent and official primary survey of people's perception and means of access provided by the Census. MTN argues that access to payphones is well documented in the Census. 4 310 143 households stated they had access to a payphone nearby in 2001. It thus concludes the Authority's proposal to ignore access to payphones on the basis of lack of reliable data is inappropriate and without basis.

CELL C

3.4.18. Cell C contends that during the negotiation and finalisation of the terms and conditions of Cell C's licence, both the Authority and Cell C representatives clearly understood the method of determining teledensity to be the simple division of the number of fixed lines in the area, by the population of that area. It submits that this common understanding was reaffirmed in correspondence between Cell C and the Authority a year ago[42]. Cell C alleges that it was informed by the Authority that its roll-out of CST's will be adjudicated with reference to this explicit method of measurement of teledensity. It contends that this method of measurement of teledensity is the one which best serves the fundamental objects of universal access to which the definition of an under-serviced area and the universal service obligations contained in Cell C's licence were

[41] MTN's oral submission lines 2-4 page 8 of the public hearings transcripts dated 8 October 2008.
[42] Cell C's written submission at pages 58, 61, 71 and 72

directed[43]. It argues that any more convoluted mechanism for determining teledensity will have the result of over-stating the teledensity in any area, and concomitantly limiting the areas within which CSTs may be located.

3.4.19. Cell C strongly argues that if the methodology for the measurement of teledensity households , rather than the individual members of the population of the area in question, areas will invariably be demonstrated to have a far greater teledensity penetration than would be the case if one were to adopt the more simple approach advocated by Cell C and the Authority. The argument goes that if the in-dwelling measure is used as the measure of teledensity, then areas such as Gugulethu, Khayelitsha and Mitchell's Plain in Cape Town and Alexandra, Soweto and Mamelodi in Gauteng would not be classified as "under-serviced areas"[44].

3.5. **DO YOU AGREE THAT THE AUTHORITY MAY RELY ON THE OCTOBER 2001 CENSUS DATA?**

TELKOM

3.5.1. Telkom contends that the Statistics Act, 1999 (Act No. 6 of 1999) mandates Statistics SA to conduct a census every five years. The manner in which data is collected is in such a way that it informs government policy making, planning and administration for demographic and social research and for research to inform business, industry, labour and the public[45]. Telkom notes that Statistics SA relies mostly on households to gather information on service delivery, and the methodology used for a *de facto* census is that only people in the household

[43] Cell C's written submission at page 71
[44] Cell C's written submission at pages 58, 61, 71 and 72
[45] Telkom's written submission at page 4

on census night are counted as part of the household and must have lived or been living in that household at least four nights a week. Telkom warns that the terms "household" and "inhabitant" cannot be interpreted to be similar or mean the same thing in the context of reliance on the October 2001 census data[46].

VODACOM

3.5.2 Vodacom agrees that the Authority should use the most reliable data relevant to the time when Cell C was licensed and in this regard it submits that the October 2001 data is the most reliable source of data that can be used[47]. Vodacom accepts that the Authority must rely on the 2001 census data. Vodacom warns that the census data ought not be used to the exclusion of any other available data, i.e., should Telkom records reflecting fixed line penetration in respect of each relevant area as of 21 June 2001 be available, such data should also be taken into account[48].

USAASA

3.5.3 USAASA agrees that the Authority should use the data gathered from the October 2001 Census[49].

MTN

3.5.4 MTN is in full agreement that the Authority may rely on the 2001 Census as there is no proper basis not to rely on the comprehensive 2001 Census data for the purposes of the Cell C licence interpretation. It argues that the Census data is highly relevant from a timing perspective and it's also of the utmost relevance to the methodological issues raised by the definition of,

[46] Telkom's written submission at page 4
[47] Vodacom's written submission at pages 8-9
[48] Vodacom's written submission at page 9
[49] USAASA's written submission at page 4.

and most importantly, perception of access by individuals[50]. MTN contends that the Census collected an extra variable, relating to the lack of access i.e. variable H. "no access to a phone". MTN argues that this statistic provides a definitive insight into the true telecommunications "have-nots" in 2001 in South Africa. Then, 668 698 households, representing 6% of the 2001 SA population stated that they did not have access to a phone, whatsoever[51].

3.5.5 Given the universal access objective of community payphones, MTN argues that the statistics aforesaid should provide a "sanity check" for the areas and population claimed by Cell C to be under-serviced in terms of Cell C's interpretation of its licence[52].

CELL C

3.5.6 Cell C did not specifically address itself to this question. It however advocates for a liberal and broad approach to the definition and consequently it is implied in Cell C's submissions that if the 2001 Census is to be relied upon as proposed by the Authority, the same may have the effect of curtailing the number of areas within which CSTs may be rolled out and thus not acceptable.

3.6. **DO YOU AGREE THAT IN THE ABSENCE OF RELIABLE DATA ON THE PUBLIC PAYPHONE PENETRATION, ALL REFERENCE RELATING THERETO SHOULD BE EXCLUDED**

TELKOM

3.6.1. Telkom believes that teledensity and access to public payphones are two conceptually different statistics that cannot

[50] MTN's written submission at page 15
[51] MTN's written submission at page 15
[52] MTN's written submission at page 15

be conflated. Under the circumstances, Telkom supports the Authority's view that reference to pay telephones should be excluded[53].

VODACOM

3.6.2. Vodacom contends that since "access" in the context of the definition of under-serviced area ought to refer to every person's ability or reasonable means of access to a publicly available telephone, data relating to public payphones is an essential and critical criterion for determination of under-serviced areas. It argues that where there is no public payphone data in respect of a particular area, it follows that it may be extremely difficult to classify or justify the designation of such an area as an "area where less than 10 percent of the inhabitants have access to PSTS exchange lines[54].

3.6.3. Vodacom opines that the suggestion by the Authority that reference to public payphone penetration be excluded due to lack of reliable data is highly problematic. It submits that the available Telkom data should nevertheless be taken into account as an estimate measurement of public payphone penetration. It is of the view that such estimation t will, together with the 2001 Census data as to whether the households/people surveyed had access to publicly available phones, be useful to establish the level of access to public phones by households, even though the exact location of such phones may not be reliably established[55].

[53] Telkom's written submission at page 5
[54] Vodacom's written submission at page 9
[55] Vodacom's written submission at pages 9-10

USAASA

3.6.4. USAASA is concerned about the Authority's proposal to disregard public payphone services simply because it is difficult to measure it at appropriate geographic delineation. USAASA has understanding for the difficulties this poses to the Authority, but nevertheless wishes the Authority to find some way to include the most possible accurate data regarding public payphone services[56]. This will, in USAASA's opinion, most accurately reflect the purpose of the definition of under-serviced areas in the Cell C licence, which ultimately is to promote universal service and access regardless of the access technology or business case used[57]. However, USAASA does not proffer any method or instrument for the Authority to achieve this.

MTN

3.6.5. MTN strongly disagrees with the proposition made by the Authority to the effect that in the absence of reliable data on public payphone penetration, all reference relating thereto should be excluded[58]. Firstly, MTN contends that the "claimed" lack of readily available data regarding payphones' access is not a proper basis upon which the Authority can rely. MTN argues that to ignore such a critical and relevant factor in the Cell C under-serviced area definition would in law, amount to dereliction of duty. It contends that if the extrapolation of the Telkom data did not draw "an accurate measurement", an estimation based on this data, or any other credible available data source, ought to be undertaken rather than ignoring a

[56] USAASA's written submission at page 4
[57] USAASA's written submission at page 4
[58] MTN's written submission at page 17

critically relevant criterion altogether[59]. Secondly, MTN submits that eminently relevant and accurate data is, in any case, readily available. It contends that the Census data has already taken public payphone data into account and therefore there would be no valid reason or basis for the Authority to discount such data. It is argued that the argument advanced by the Authority appears to be driven by a misunderstanding, that is, an attempt to count phone lines in a given area (a teledensity view), when the relevant concept is in fact access[60].

CELL C

3.6.6. Cell C agrees with the Authority that since reliable data in respect of such payphones is not available for the period in question, such pay phones ought to be disregarded for the purposes of calculating teledensity. Cell C recognises that, in consequence, the teledensity of areas in which payphones were situated, may be slightly understated as a result. Nevertheless, it contends that such understatement can only have the positive effect of increasing universal access by increasing the number of areas in which CST's may be rolled-out to meet the demand and will serve to minimise the discrepancies between network operators, with the additional advantageous benefits of competition[61].

3.7. **DO YOU AGREE WITH ICASA'S INTERPRETATION IN 3.18 TO 3.22?**

TELKOM

3.7.1. Telkom submits that in order to determine whether the conjunction "and" is an alternative or whether it creates an

[59] MTN's written submission at page 17
[60] MTN's written submission at page 17
[61] Cell C's written submission at page 76

additional category, one has to look at the words used in the paragraph and determine whether it has a particular meaning as gathered from the context of the paragraph as a whole. If the word gives a general meaning, then it may be construed to mean an additional category, unless it is contrary to the context in which it is used[62].

3.7.2. Telkom notes that the word "and" may be read as "or" and the word "or" as "and" when the context renders it absolutely necessary, but a court would construe "or" use in a statute as "and" when the natural meaning would give rise to an interpretation that is unreasonable, inconsistent or unjust[63]. In reading the relevant paragraph in its proper context, Telkom argues that the word "and" appears better to give effect to the obvious intention of the legislature [Authority] with regard to access in under-serviced areas, and therefore cannot be read to mean "or", allowing Cell C to exercise discretion.

3.7.3. Telkom submits that the word "necessary" would be a necessary implication arising out of the obligations of the Cell C licence with regard to under-serviced areas. The word "necessary", it contends, may imply "where proper and appropriate", within the context in which it is used and therefore cannot be construed to be absolute. If it were to be absolute, Telkom contends there would be no discretion whatsoever left for the Authority in deciding or proposing amendments to the plan.

3.7.4. Telkom recommends the insertion of the term "proportional" immediately after the word "balanced". It is argued that this insertion will ensure that there is equitable distribution of

[62] Telkom's written submission at page 5
[63] Gorman v Knight Central GM Co Ltd TPD 597

facilities. Telkom, in conclusion, agrees that there should be proportional distribution of CSTs[64].

VODACOM

3.7.5. Vodacom is in agreement with the Authority's interpretation that the word "and" creates an additional instead of an alternative category and cannot be applied independently from the criteria preceding it in the definition. As such it contends that an area where more than 10% of the inhabitants thereof have access to PSTS exchange lines will not qualify as an area where it is necessary to roll-out CSTs[65].

3.7.6. Vodacom submits that "geographic disparity" should be interpreted to mean increasing access to public telephony in areas where access to telecommunications was inadequate/non-existent, thereby reducing geographic inequality in terms of access to telephony services in such areas.

3.7.7. Vodacom notes the acknowledgement by the Authority that Annexure A2 to Cell C's licence does not exist. However, it argues that it is not clear from the Authority's statement whether the non-existence of Annexure A2 is due to an error or whether it was intentionally omitted. It is not sufficient, Vodacom argues, for the Authority to merely state that the omission of the annexure is inconsequential as it does not render the definition invalid or incapable of implementation. Vodacom argues that in light of the absence of Annexure A2 as well as relevant public payphone data it appears that Cell C was left to decide for itself the parameters of what constitutes an under-serviced area for purposes of its licence[66]. Vodacom, in its oral presentation,

[64] Telkom's written submission at page 5
[65] Vodacom's written submission at page 10
[66] Vodacom's written submission at page 11

submits that the omission of the Annexure is not inconsequential, as the Authority intended to exclude certain areas from the definition, but omitted to append Annexure A2.

USAASA

3.7.8. USAASA agrees that the conjunction "and" cannot be read to mean 'or'[67]. However, it argues that this alone does not answer the question whether or not there are two separate categories of under-serviced areas set out in the definition or whether it is only one definition that must meet both criteria[68]. USAASA is thus not unsympathetic to the interpretation proposed by Cell C.

3.7.9. USAASA argues that Cell C's proposed interpretation would mean that every area where there is less than 10% access would be under-serviced and in addition thereto, other areas might be considered under-serviced. It agrees that the burden should be on Cell C to show that it is necessary to roll out CSTs in those areas chosen by it; however, it submits that the ultimate decision as to whether or not the areas are in fact under-serviced must be determined by the Authority[69].

MTN

3.7.10. MTN agrees with the Authority's conclusion that the conjunction "and" cannot be read to mean "or". MTN argues that the logical implication of the "and" is that the areas derived using the 10% computational threshold can only represent the largest possible under-serviced area in the Cell C licence. MTN reiterates the relevance of the "no access to a telephone" statistic is for the purpose of prioritising the roll-out of Cell C's CST's. MTN

[67] USAASA's written submission at page 4
[68] USAASA's oral submission lines 7-11 at page 44 of the public hearings transcripts dated 6 October 2008
[69] USAASA's oral submission lines 15-19 at page 44 of the public hearings transcripts dated 6 October 2008

concludes that the conjunction "and" in Cell C's licence is there to ensure that those people who need the universal access subsidy the most should receive it first[70].

CELL C

3.7.11. Cell C argues that the history is vital in this regard given the creation of a migrant commuter sector of the population. It contends that universal access cannot be achieved merely by placing such access at the home. It is argues strongly that such access should also be made available at the centres of economic activity within the country[71]. It is only by this means, Cell submits, that telecommunications would achieve its proper potential in ameliorating the social, geographic and economic disparities systematically created by the apartheid system.

3.7.12. Cell C argues that the geographical disparities caused by apartheid can only adequately be reduced if people removed from economic centres as residents, are enabled to participate in the economic life of those centres - eventually resulting in their permanent migration there. This can only be achieved, so runs the argument, through access for them at those centres, even though by definition teledensity will be greater than 10% when measured against the existing residents of those centres[72].

3.7.13. Cell C concludes that the fundamental policy objectives of universal access demand that this segment of the definition be understood to create an additional basis upon which an area may be classed as "under-serviced", even though its teledensity

[70] MTN's written submission at page 18
[71] Cell C's written submission at page 76
[72] Cell C's written submission at page 77

exceeds 10%. Cell C contends that to adopt a contrary view will result in[73]:

3.7.14. reducing the number of areas in which CSTs may legitimately be located;

3.7.15. increasing the disparities which exist between the various network operators' licences; and

3.7.16. defeating the objects of universal access which are so central to the telecommunications regulatory regime.

4. ANALYSIS AND DECISION

4.1. In clause 1.47 of Annexure A to the Cell C licence, an "Under Serviced Area" is defined as follows:

"any city, town, township, shanty town, location, village or human settlement or any part thereof where less than 10% of the inhabitants of the area have access to PSTS exchange lines at the date of issue of this licence and where it is necessary to roll out Community Service Telephones to address the reduction of geographical disparities through proportional distribution of such phones and shall, in any event, not be areas in the territory that are listed in Annexure A2"

4.2. The Authority notes that in as much as there is consensus among the interested parties on various aspects of the definition, there are equally varying opinions on others. The Authority will, in analysing and deciding the issues that it is seized with probe each issue and make a conclusion thereon. The conclusions of the Authority are set out herein below.

[73] C's written submission at page 78

4.3. **Question 1 – Officially Defined Area**

4.3.1. Having considered all the submissions made by the interested parties, the authority remains of the view that the suffix **"any part thereof"** should be construed to mean a municipally or officially demarcated area including a sub-place name within a city, town, shanty town, etc. The Authority notes that the definition lists a descending order of collective settlements. They range from a metropolitan centre in the form of a city to a village. When then, one reads the final alternative "or human settlement", it should be taken in the view of the Authority as a settlement of the same type as mentioned in the *genus*, i.e. a settlement involving a number of persons living together in the same form of collective as a city or a town or a location or a village. However, this element of the definition cannot be read in isolation from the succeeding phrase which determines "where less than 10%...have access".

4.3.2. Accordingly, taking into account the practicality of implementation of this element of the definition with reference to available or obtainable data, the Authority determines that the area contemplated herein will be limited only to an officially identifiable place such as a suburb of a town or city, or a municipally defined section, ward or zone of a township or sub-place name as referred to by Statistics South Africa.

4.3.3. USAASA has commissioned a study on the definition of universal service and access including the definition of under-serviced areas in terms of the Electronic Communications Act, 2005 (Act No. 36 of 2005). The agency has published a Discussion Document in the Government Gazette Notice 987 dated 15 August 2008 inviting interested parties to submit written representations not later than 7 November 2008. The Authority has received, in some of the submissions, strong

views that it would be useful for the Authority to await the completion of the study commissioned by USAASA which can positively shape and inform the process of formulating an appropriate and relevant definition of an under-serviced area in terms of the ECA.

4.3.4. Vodacom in particular states that "instead of initiating an inquiry focused on Cell C, it would be more appropriate for the Authority to initiate a section 4B inquiry on a definition 'suggested' by USAASA on completion of the study"[74].

4.3.5. Section 88(2) of the ECA endows the Authority with powers to prescribe by regulation a definition of under-serviced areas. The purpose of this determination is in respect of the payment of subsidies out of the Universal Service and Access Fund and for the construction of infrastructure in under-serviced areas. The study commissioned by USAASA and the findings resultant therefrom will assist and be utilised by the Authority in its processes in prescribing the regulations in terms of section 88(2) of the ECA.

4.3.6. The study commissioned by the agency is a forward-looking exercise that intends to formulate a definition on universal service and access as well as under-serviced area for future purposes, whilst the present inquiry is intended only to interpret the definition of under-serviced area as defined in the Cell C licence ***at the time of issuance of the licence***. It is therefore inappropriate to submit that the Authority must await the completion of the study commissioned by USAASA before deciding upon this issue. Consequently, the Authority concludes that it will serve no purpose for it to await the completion of the

[74] Vodacom's written submission page 3

study commissioned by USAASA as such a study will have no bearing upon the present inquiry.

4.4. **Question 2 - Inhabitants**

4.4.1. The Authority proposed in the Discussion Document that the word "inhabitant" should bear its ordinary meaning, i.e. persons who live in and occupy a place. The words "live" and "occupy" should thus be interpreted to mean living in or occupying a place with some degree of permanency. In addition, for purposes of this definition, reference to persons (as inhabitants) should be interpreted to mean individual persons as opposed to households. It is the Authority's view that having regard to the totality of the choice of words used in the definition, it was clearly the intention of the Authority to deviate from any meaning that would relate to households[75].

4.4.2. Cell C has consistently argued that the definition of "inhabitant" must be altered to accommodate the daily immigrants who commute to the economic centres of the country in order to participate meaningfully in economic centres. The definition of "community" in terms of section 1 of the Municipal Systems Act, 2000 (Act No. 32 of 2000), as proposed by Telkom, tends to cast the net wider as it is inclusive of "visitors and other people residing outside the municipality who because of their presence in the municipality make use of services or facilities provided by the municipality"[76].

4.4.3. There are no compelling reasons to persuade the Authority to depart from the ordinary meaning of the word "inhabitant" as there are no reasons advanced that if the ordinary or literal meaning of the word is followed it will lead to an absurd result.

[75] Discussion Document published in Government Gazette Notice No. 558 dated 6 May 2008
[76] Telkom's written submission page 3

4.4.4. Strict adherence to the words of a provision may, for instance, produce an interpretative result so absurd and repugnant to "common sense" that the legislature can hardly be believed to have intended it. The dictum of Lord Wensleydale is a classical exposition and it is perhaps appropriate, at this stage, to quote it in verbatim:

"The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no farther"[77].

4.4.5. In recent judicial developments, the Supreme Court of Appeal has pronounced that literalism has remained the part and parcel of our jurisprudence of interpretation when it reminded that:

"Interpretation concerns the meaning of the words used by the Legislature and it is therefore useful to approach the task by reference to the words used and to leave extraneous considerations for later".[78]

4.4.6. In a later judicial pronouncement, the Supreme Court of Appeal re-affirmed adherence to the literal and ordinary meaning of the words when it stated:

"But the passage also reflects that it is not the function of the court to do violence to the language of a statute and

[77] Grey v Pearson [1843-60] ALL ER Rep 21 (HL) 36; that surrounding circumstances may, in some instances, lead to a different interpretation appears from *Baron & Jester v Eastern Metropolitan Local Council* 2002 (2) SA 248 (W) at 254 *et seq.* To refer to the circumstances which prevailed at the time when the licence was issued would, to our mind, seem speculative in so far as the definition of "inhabitants" is concerned.
[78] Per Harms JA in East London Municipality v Abrahamse 1997 (4) SA 613 (SCA) at 632G

impose its view of what the policy or object of a measure should be"[79].

4.4.7. The Constitutional Court intimated that a similar line of reasoning can, to some extent at least, stand constitutional interpretation in good stead:

"The Constitution does not mean whatever we might wish it to mean...[E]ven a Constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.....I would say that a constitution embodying fundamental principles should as far as its language permits be given a broad construction"[80].

4.4.8. In the circumstances, it is abundantly clear that one has to adhere to the literal and ordinary meaning of the words in their grammatical context and unless such would lead to an absurdity or inconsistency. Mr *Marcus*, who appeared for MTN, strongly argued that it is only when there are genuine ambiguities that other rules of construction come into play and one should not be blinded by this magical umbrella of a purposive interpretation"[81]. The Authority aggress with these submissions. In light of the aforesaid, the Authority maintains that the word "inhabitant" will bear its literal and ordinary meaning, that is, persons who live or occupy a place.

[79] Per Schutz JA in Standard Bank Investment Corp v Competition Commission 2000 (2) SA 797 at 810 D-E
[80] Per Kentridge AJ in S v Zuma 1995 (4) BCLR 401 paragraphs 17-18
[81] MTN's oral submission lines 14-18 page 22 of the public hearings transcript dated 8 October 2008

4.5. **Question 3 - PSTS**

4.5.1. Save for Cell C who has not made any submissions in this regard, all parties are in agreement that the term PSTS in the Cell C licence excludes mobile phones and that it refers only to fixed lines and public payphones as provided in terms of section 39 of the now repealed Telecommunications Act, 1996 (Act No. 103 of 1996).

4.5.2. Accordingly the Authority maintains the interpretation it proffered in the Discussion Document.

4.6. **Question 4 – Access**

4.6.1. Access in general parlance means "the ability to approach or to come into contact with" the object which is being accessed. The Authority's interpretation of "access" means the ability of inhabitants of an area to reach and/or use a house telephone or public payphone. Universal access generally refers to a situation where every person has a reasonable means of access to a publicly available telephone. Universal access may be provided through pay telephones, community telephone centres, tele-boutiques, community internet access terminals and similar means[82]. Universal access has been defined in many different ways in different countries, such as a phone for every settlement with over "x" population (500 people in Ghana); a phone a certain distance from everyone (20 km in Burkina Faso); or a phone within a certain travelling time (such as 30 minutes)[83]. Other countries focus on getting at least one line into all villages and localities, such Mexico, Thailand and Poland. It is therefore

[82] Telecommunications Regulation Handbook (2000) edited by Hank Intven of McCarthy Tetrault module 6 6.1
[83] Background paper on Universal Service and Universal Access issues (1999) Seminar, Sweden by Peter Benjamin and Mona Dahms page 15.

common cause that there is no authoritative or universally accepted definition of universal access.

4.6.2. There is not as yet a commonly acceptable definition of "access" in the Republic of South Africa. The next logical approach is to seek guidance from international instruments, bearing in mind that each country is expected to implement its own definition of "access", taking into consideration its peculiar socio-economic circumstances. The International Telecommunications Union ("the ITU") defines "access" as a percentage of the population covered by either fixed telephones lines, mobile telephony or the percentage of localities with public internet access centres by number of inhabitants[84]. It is apparent from the plain reading of the Cell C licence that "access" was in this instance given a *sui generis* meaning with no regard to acceptable definitions such as that of the ITU. It is confined only to fixed line penetration. Therefore, the Authority is of the view that "access" in this instance be interpreted to mean the ability of the inhabitants of an area i.e. city, town, shanty town, etc to reach and/ or use a house telephone or public payphone. In this respect, the Authority accordingly rejects the Cell C proposition which advocates for the Application of the teledensity method of measurement and reference to objects of universal access in determining the meaning of access within the context of this definition.

4.6.3. Telkom contends that one part of the definition as proposed by the Authority makes reference to teledensity and another to penetration and thus resulting in a conflict of use of terminology. It remains the view of the Authority that access within the context of this definition does not connote its industry acceptable meaning, but one that is germane only to this definition and thus

[84] ITU, Second Workshop on Information Society Measurement for Latin America and the Caribbean Santo Domingo, Dominican Republic 20-21 October 2005: *Core set of indicators: Basic access and Infrastructure.*

the Authority does not align itself with the view expressed by Telkom.

4.6.4. The Authority has dealt above with the Vodacom contention which advocates for reference to the definition of universal service and access under the ECA, which would include the definition of an USA. The Authority reiterates that such data would be irrelevant in this instance as it will not have any bearing in the interpretation of the Cell C licence which predates the conclusion of such study.

4.7. **Question 5[85] - October 2001 Census Data**

4.7.1. Most of the parties that have participated in this inquiry have indicated that the Authority should use the most reliable data relevant to the time when Cell C was issued with a licence and in this regard the October 2001 Census data is the most reliable source of data that can be used. Telkom warns that Statistics SA rely mostly on households to gather information and warns that the term "household" and "inhabitants" cannot be interpreted to mean the same thing in the context of reliance on October 2001 Census data.

4.7.2. The Authority is satisfied that the October 2001 census data is the most relevant and/or reliable form of data available in aid of interpretation of the definition of under serviced area as contemplated in the Cell C licence, subject of course to the short coming it has with reference to public pay phone data, which will be discussed separately hereunder.

[85] Incorrectly numbered 6

4.8. **Question 6[86] - Public Payphones**

4.8.1. Most of the parties, except for Telkom and Cell C, seem to criticise the position suggested by the Authority that in the absence of the reliable data on the public payphone penetration, reference thereto should be excluded. The Authority is mindful of the relevance and importance of the data relating to public payphones and the critical role such data may play in the determination of the definition of under-serviced areas in terms of Cell C's licence.

4.8.2. It has been suggested that the Authority may get the information on public payphones from the Telkom data that is available. However, the Authority was informed in no uncertain terms by Telkom that it (Telkom) has no data available on public payphones at least in the manner and form contemplated in the Cell C licence. Cell C has strongly argued that the questionnaires that were used in the October 2001 Census had a litany of inaccuracies and that there were no clear-cut distinctions whether the access to telephone relates to public payphones, fixed lines, commercial payphones or cellular phones.

4.8.3. Telkom has pointed-out in its oral presentation that Statistics SA used both household telephones and mobile telephones to gather data whilst the Authority excludes mobile telephones to determine access.

4.8.4. MTN is strongly opposed to the exclusion of public payphone data. It contends among others that an estimation based on Telkom data or any other credible data source, ought to be

[86] Incorrectly numbered 5

undertaken rather than ignore public payphone data at all. The Authority has without success explored all possible means to obtain reliable public payphone penetration data. Further, whilst the Authority accepts that the October 2001 Census data may have factored in public payphone data, the census report fails to make reference to the area in which a respondent may have accessed a public payphone and thus not of assistance in the interpretation adopted by the Authority. Therefore, the Authority remains of the view that it will proceed with the determination of interpretation of under serviced areas as contemplated in the Cell C licence without reference to public payphone penetration data, unless it is provided therewith by any of the interested parties who may feel prejudiced by the exclusion thereof.

4.9. **Question 7**[87]

And/or debate

4.9.1. There is, by and large, consensus among the parties that the conjunction "and" creates an additional category rather than as an alternative, as argued by Cell C. It was argued strenuously by Mr *Leibowitz*, who appeared on behalf of Cell C, that "and" should be read as "or". He conceded though that this would amount to a functionalist approach in interpretation, but contended that the overall (Constitutional) purpose of economic empowerment of the disadvantaged would be served by such a substitution. Examples were given of areas which were, so the argument ran, in dire need of service, but did not fall within the definition of under-serviced areas.

4.9.2. On the other hand Mr *Marcus*, who appeared on behalf of MTN, argued that the word "and" could not simply be substituted by

[87] Incorrectly numbered question 6

"or". He argued that the amendment would run contrary to the meaning of the definition as a whole. The word "and" rationally links the first part of the definition to the second part.

4.9.3. In a Supreme Court of Appeal judgement it was held:

"It is unfortunately true that the words 'and' and 'or' are sometimes inaccurately used by the Legislature and there are many cases in which one of them has been held to be the equivalent of the other.....Although much depends on the context and subject-matter....it seems true to me that there must be compelling reasons why the words used by the Legislature must be replaced,.....The words used should be given their ordinary meaning 'unless the context shows or furnishes very strong grounds for presuming that the Legislature really intended that the word not used is the correct one....[88]".

4.9.4. In deciding on this aspect, a cue can be taken from what Yacoob J in a comparable context stated:

"Fourthly, the High Court misconceived the extent of its powers to construe a legislative provision consistently with the Constitution. A court's power to do so is not unqualified. A court cannot give a meaning to the provision which it regards as consistent with the Constitution without more. The provision concerned must be reasonably capable of the preferred construction without undue strain to the language of the provision. The words 'liable to be

[88] Per Olivier JA in Ngcobo and Others v Salimba CC. Ngcobo v Van Rensburg 1999 (2) SA 1057 (SCA) at 1067J-1068B, which was quoted with approval per Snyders AJA in Guardrisk Insurance CO LTD v Registrar of Medical Schemes 2008 (4) SA 620 (SCA) at 623 Para 9.

surrendered', in their context, are incapable of bearing the meaning contended for"[89].

4.9.5. It is the Authority's view that it is legally impermissible to alter the word 'and' to 'or'. The word 'and' is simply not, in the words of Yacoob J, reasonably capable of a substitution by the word 'or'. The words that follow upon 'and' are contextually related to the first part of the definition. They add a requirement of necessity. If for example, a town has been vacated there would certainly be 'access' by less than 10%, but it would be nonsensical and thus unnecessary to roll-out CST's there.

The necessity requirement

4.9.6. Another key word in the component above is 'necessary'. It is not clear as to what facts should be taken into account in order to establish such necessity. However, whether or not it is necessary to roll out CSTs in any particular area that satisfies the first part of the definition will be dependent upon the reasons advanced by Cell C in support of its rollout and if the reasons so advanced by Cell C are acceptable to the Authority, such telephones shall be accepted as CSTs for the purpose of determining compliance by Cell C with its USOs.

Geographical disparities

4.9.7. Reference to "geographical disparities" is to be interpreted to mean increasing in a balanced manner access to telephony in geographical areas where access to telecommunications was inadequate or non-existent, thereby reducing geographical inequality in terms of access to telephone services in such areas. The proportional distribution of CSTs is to be interpreted

[89] Per Yacoob J in Director of Public Prosecutions, Cape of Good Hope v Robinson 2005 (1) SA 1 (CC)

to mean that the roll-out of CSTs should not be concentrated in one geographical area, but that there should be a balance in the deployment of CSTs in areas that are under-serviced.

4.9.8. In other words, a geographical disparity in this instance would refer to an area which is under serviced in comparison with the average service access available in comparable areas.

Missing list in annexure A2

4.9.9. The Authority maintains that although the inclusion of the list of territories which were to be excluded from the definition of USAs would have assisted in the interpretation of the interpretation, it omission does not render the definition invalid and/or incapable of implementation.

4.9.10. In general, the rules of interpretation of documents of this sort require each word to be given its proper meaning and effect so that no word or phrase can be ignored, The rule carries with it an important limitation. Where the giving of effect to every word in such a document would render the document incapable of application or absurd, then it is permissible to ignore the words which cause the difficulty. Examples of cases in which the Courts have imposed such limitations are to be found in:

In re Lockwood, 1958 Ch, D.231 where the words **("or in indeed of any members of that class")** were ignored because otherwise the result would be capricious and absurd.

The King v Ettridge, 1909 KB 24 where it was held that –

"where no meaning can be given to certain words of a statute...or where the stature would become a nullity were all the words retained, the Court has power to read the

section as though the words which make it meaningless or nullify it were not there..."

See also: *Rex v Vesey, [1905] 2 KB 748; and Hough v Windus, 12 QB 224 AT 229".*

4.9.11. Accordingly, the Authority is of the view that this is a typical case where the definition will be construed by simply ignoring the words which refer to, and purport to incorporate, the non-existent Annexure A2. In other words, the balance of the definition following the words "of such phones" may be treated as *pro non scripto.*

5. SUMMARY OF FINDINGS

We set out below a summary of our findings:

"any part thereof"

5.1. Taking into account the practicality of implementation of this element of the definition with reference to available or obtainable data, the Authority determines that the area contemplated herein will be limited only to an officially identifiable place such as a suburb of a town or city, or a municipally defined section, ward or zone of a township or sub-place name as referred to by Statistics South Africa.

"inhabitant"

5.2. The Authority proposed in the Discussion Document that the word "inhabitant" should bear its ordinary meaning i.e. persons who live in and occupy a place. The words "live" and "occupy" should thus be interpreted to mean living in or occupying a place with some degree of permanency. In addition, for purposes of this definition, reference to

persons (as inhabitants) should be interpreted to mean individual persons as opposed to households.

"PSTS"

5.3. Save for Cell C who has not made any submissions in this regard, all parties are in agreement that the term PSTS in the Cell C licence excludes mobile phones and that it refers only to fixed lines and public payphones as provided in terms of section 39 of the now repealed Telecommunications Act, 1996 (Act No. 103 of 1996).

"access"

5.4. The Authority's interpretation of "access" means the ability of inhabitants of an area to reach and/or use a house telephone or public payphone. The Authority is of the view that "access" in this instance should be interpreted to mean the ability of the inhabitants of an area i.e. city, town, shanty town, etc to reach and/ or use a house telephone or public payphone within their defined locality.

"October 2001 Census Data"

5.5. The Authority is satisfied that the October 2001 census data is the most relevant and/or reliable form of data available in aid of interpretation of the definition of USA as contemplated in the Cell C licence, subject of course to the short coming it has with reference to public pay phone data.

Public Payphone Data

5.6. The Authority has without success explored all possible means to obtain reliable public payphone penetration data. Whilst the Authority accepts that the October 2001 Census data may have factored in public payphone data, the census report fails to make reference to the

area in which a respondent may have accessed a public payphone and thus not of assistance in the interpretation adopted by the Authority. Therefore, the Authority will proceed with the determination of interpretation of USAs as contemplated in the Cell C licence without reference to public payphone penetration data, unless it is provided therewith by any of the interested parties who may feel prejudiced by the exclusion thereof.

Conjunction "and"

5.7. The words that follow upon 'and' are contextually related to the first part of the definition. They add a requirement of necessity and should thus be read as creating an additional but not alternative category.

Necessity Requirement

5.8. Whether or not it is necessary to roll out CSTs in any particular area that satisfies the first part of the definition will be dependent upon the reasons advanced by Cell C in support of its rollout and if the reasons so advanced by Cell C are acceptable to the Authority, such telephones shall be accepted as CSTs for the purposes of determining compliance by Cell C with its USOs.

"geographical disparities"

5.9. Reference to "geographical disparities" is to be interpreted to mean increasing in a balanced manner access to telephony in geographical areas where access to telecommunications was inadequate or non-existent, thereby reducing geographical inequality in respect of access to telephone services in such areas. In other words, a geographical disparity in this instance would refer to an area which is under serviced in comparison with the average service access available in comparable areas.

"Annexure A2"

5.10. The Authority maintains that although the inclusion of the list of territories which were to be excluded from the definition of USAs would have assisted in the interpretation of the definition, its omission does not render the definition invalid and/or incapable of implementation.

6. CONCLUSION

6.1. On the basis of the findings recorded above, Cell C will be invited to submit its roll out plans taking into account the findings and conclusions set out in this document. Cell C will be afforded an opportunity to motivate its rollout plans in a meeting with the Authority, which shall not be open to the rest of the interested parties.

6.2. It was contended by MTN that any subsequent approvals of the Cell C rollout plans by the Authority, if and when made, cannot apply retrospectively. This view is rejected by Cell C. The Authority is equally not persuaded by the view expressed by MTN in this regard. However, taking into account that this matter does not per se form the subject of this enquiry, the authority shall refrain from expressing in this document the full reasons for the conclusion it has reached. Accordingly, to the extent that some of the units already deployed by Cell C are found by the Authority in the exercise of its monitoring and compliance function to be located within USAs as contemplated in the Cell C licence, such units shall be taken into account in determining the compliance or lack thereof by Cell C with its USOs.

6.3. The Authority wishes to point out that the above legal interpretation should now put a closure to the interpretation of the meaning of USAs as contemplated in the Cell C licence. The compliance by Cell C with its USOs will however be considered in due course upon receipt by the authority of Cell C's roll-out plans which will be required to be compiled in accordance with the interpretation guidelines set out in this document.

PARIS MASHILE
CHAIRPERSON
ICASA